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CASES

DECIDED

IN THE HIGH COURT

OF THE

TRANSVAAL PROVINCE,

WITH TABLE OF CASES AND ALPHABETICAL INDEX.

REPORTED BY

J. G KOTZÉ, LL.B.,

OF THE INNER TEMPLE, BARRISTER-AT-LAW,
JUDGE OF THE LATE HIGH COURT.

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TABLE OF CASES REPORTED IN THIS VOLUME.

	PAGE
Archer *vs.* Van Rensburg	170
Attorney-General *vs.* Skinner	4
Baillie *vs.* Hendriks, Hoffman, and Browne	211
Baker *vs.* Saunders	176
Barrett *vs.* Executors of O'Neil	104
Beeton *vs.* Wemmer	101
Bok, *ex parte*	167
Bok, *ex parte*	223
Boshoff *vs.* Boshoff's Executors	49
Bosman *vs.* Preller & De Villiers	12
Botha, Smit, and Others *vs.* Kinnear	215
Bourhill *vs.* Watson & Co.	54
Breyterbach *vs.* The Queen	55
Brodrick *vs.* Leathern	139
Cape Commercial Bank *vs.* Fleischman and Van Rensburg	1
Cape Commercial Bank *vs.* Schröder & Co.	161
Celliers *vs.* Boshoff	200
Celliers *vs.* The Queen	237
Cloete *vs.* The Government	175
Colquhoun *vs.* Brits	193
Compton *vs.* Williams	160
Conradie *vs.* Dunell, Ebden & Co.	227
Cooper *vs.* Jocks	201
Coventry Brothers *vs.* Kingsmill	203
Curator of Marais' Estate *vs.* Woodbine Cloete	187
Curator of Van der Merwe's Estate *vs.* Van der Merwe	148
D'Arcy *vs.* Skinner and Green	231
Dargon, *ex parte*	146
Deecker, *ex parte*	145
De Hart, *ex parte*	190
De Hart *vs.* Steyn	132
De Pass and Hamilton, *ex parte*	191
Don *vs.* Erasmus	254
Dore *vs.* Meintjes	101
Du Toit *vs.* Hudson	220
Evans *vs.* Watermeyer	58
Ferguson *vs.* Pretorius	157
Finegan *vs.* Finegan	159
Fox, James, and Jones. *ex parte*	168
Gaisford *vs.* Marais & Co.	111
Gouws *vs.* The Queen	141

PAGE

Green *vs.* Gibaud 193
Harsant *vs.* Becker and De Vries 236
Herschenssohn *vs.* Cohen 255
Hudson, *ex parte* 224
Jacobs *vs.* The Queen 173
Johnston *vs.* Keiser 166
King *vs.* Henderson 171
Kirstein *vs.* Gronum 166
Kleinhans *vs.* Cronjé 129
Leathern *vs.* Brodrick 143
——— *vs.* Henderson 46
——— *vs.* Surtees 100
Lithauer, *ex parte* 38
Longlands *vs.* Francken 256
Loots *vs.* Van Vuren 57
Loxton *vs.* Brayhirst 33
Lubbe *vs.* Genis 171
Lucas *vs.* Reston 45
McGregor, *ex parte* 56
McHattie *vs.* Twycross 190
Mears *vs.* Leathern 169
Meintjes *vs.* Meintjes 252
Muller *vs.* Van der Heide 17
Municipality of Potchefstroom *vs.* Cameron 206
Nyshens *vs.* Nyshens 146
Oosthuysen, *in re* 98
O'Reilly *vs.* Leathern 62
Page *vs.* Hudson 229
Perrin *vs.* Potgieter 61
Perrin *vs.* Turton 25
Phelan, *in re* 5
Pietersen, *in re* 13
Potchefstroom Municipality *vs.* Cameron and Shepstone 185
Poultney *vs.* The Master 200
Preller & De Villiers, *ex parte* 222
Preller & De Villiers *vs.* Muller 100
Queen *vs.* Booth 50
——— *vs.* Botha 145
——— *vs.* Botha 189
——— *vs.* Davis 173
——— *vs.* Fleischman and Katryn 172
——— *vs.* Herbst 187
——— *vs.* Honey 235
——— *vs.* Joseph 131
——— *vs.* David Lynx 110
——— *vs.* Potts 115
——— *vs.* Saul, Rooikraal, and Saul 32
——— *vs.* Sepana 172
——— *vs.* Smith 173
——— *vs.* Van Rensburg 144
Ras and Van Zyl *vs.* Wolmerans 37

	PAGE
Reed *vs.* Lee	130
Rehbock, *ex parte*	103
Rens, *ex parte*	134
Rex *vs.* Stamp	63
Roselt and Inglis, *in re*	13
Rudolph *vs.* White & Tucker	135
Russell, *ex parte*	189
Russell *vs.* Von Grassouw	112
Stamp *vs.* Rex	147
Simpson *vs.* Lemkuhl	140
Spies *vs.* Holtshausen	59
Tipper and Good *vs.* Van den Burg	112
Truter *vs.* Truter	34
Turton *vs.* Sargeant	170
Twycross *vs.* McHattie	198
Uys *vs.* Vos	57
Van Blerk *vs.* Hollins & Holder	128
Van Breda *vs.* Johnstone	193
Van Eeden *vs.* Kirstein	182
Van Manen, *ex parte*	259
Van der Merwe *vs.* Turton and Juta	155
Van Rensburg *vs.* Swart	99
Van Wijk *vs.* Krige	39
Weatherley, *ex parte*	111
Weatherley *vs.* Weatherley	66
Welsh *vs.* Bernhard, Cohen & Co.	192
White & Tucker *vs.* The Administrator	127
———— *vs.* Rudolph	115
Williams *vs.* Young	134
Zeiler, *ex parte*	226
——— *vs.* Hollins & Holder	255
——— *vs.* Rosseau	35
Zeiler & Co. *vs.* Sheppard	253
Zeiler *vs.* Weeber	17

INDEX TO THE VOLUME.

PAGE

ABSENT HUSBAND.—See Adultery.

—— See Transfer by Wife.

ABSENT WITNESS.—See Deposition.

ABSOLUTION FROM THE INSTANCE.—See Defamation.

ADIATION.—See Inheritance.

ADMINISTRATOR.—Under the Annexation Proclamation of 12th April, 1877, the local Administrator has no power to legislate for the territory of the Transvaal. *White & Tucker* vs. *Rudolph*.. .. 116

—— Leave to sue the Administrator refused. *White & Tucker* vs. *The Administrator* 127

—— An application for leave to sue the Administrator must be made in Court, and not in Chambers. *Ibid.*

ADULTERY.—Where a husband had been absent from home, and returned to his wife, who, within six months of such return, gave birth to a full-born child; *Held*, proof of adultery by the wife with some person unknown. *Finegan* vs. *Finegan* 159

—— See Jurisdiction.

ADVOCATE.—An advocate is liable to pay a licence or personal tax under Ordinance No. 2, 1871, § 5. *Cloete* vs. *The Government* .. 175

—— Suspension from practice of.—See Attorney.

AFFIDAVIT.—Held, *per curiam*, that it could not compel one F. to make an affidavit as to certain alleged facts. *Leathern* vs. *Surtees* 100

—— An affidavit is not admissible to prove presentment of a promissory note in a provisional case. *Simpson* vs. *Lemkuhl* .. 140

—— An affidavit must be duly signed by the Justice of the Peace before whom it purports to have been sworn. Ex parte *Deecker* 145

—— Affidavits can not be received to supplement, or add to, the Record of proceedings in a Landdrost Court. Such affidavits are, however, admissible in support of an application to send the Record back to the Landdrost on the ground of incompleteness. *Jacobs* vs. *The Queen* 173

AGENT.—An action is rightly brought against an agent, in his capacity as such, where the terms of the power granted him by an absent principal give authority to sue and defend, and to choose *domicilium*, &c. *Rosman* vs. *Preller & De Villiers* 12

ALIMONY.—An application by a wife for alimony refused, where she had ample means of her own, and the husband's income was limited. Ex parte *Weatherley* 111

AMENDMENT.—See indictment.

PAGE

ANNEXATION PROCLAMATION.—See Administrator.

ANTE-NUPTIAL CONTRACT.—See Placaat.

—— No ante-nuptial contract can secure to the wife any of the husband's property in a competition with his creditors, although the husband at the time of such contract was in solvent circumstances. *Curator of Van der Merwe's Estate* vs. *Van der Merwe* .. 148

—— A wife can protect her own property by ante-nuptial contract against her husband's creditors. Where, therefore, the property of the wife, secured by ante-nuptial contract, of which the defendants had notice, had been seized and sold in execution of a judgment against the husband, the Court held that an action for damages at the suit of the wife lay against the defendants. *Van der Merwe* vs. *Turton and Juta* 156

APPEAL.—In an appeal from the Court of Land Commission, the Court ordered a diagram of certain land to be framed to enable it to arrive at a proper decision. *Ras & Van Zyl* vs. *Wolmerans* 37

—— The High Court Proclamation of 18th May, 1877, does not limit the right of appeal to the Privy Council to the case of a judgment in an ordinary civil suit or action, but extends it to any rule or order having the effect of a final and definitive sentence. *Rudolph* vs. *White & Tucker* 135

—— The 35th Rule of Court requires that within one month after the petition for leave to appeal has been lodged with the Registrar, recognizances shall be entered into, and security given, by the party appellant to the party respondent, for the due prosecution of such appeal and for the payment of the costs thereof, in default whereof such appeal will be disallowed. Where, therefore, a petition for leave to appeal had been lodged with the Registrar on 31st May, and was heard by the Court on 1st July, no recognizances having been entered into in the meantime, the Court dismissed the petition. *Ibid.*

—— An application to strike an appeal case off the Roll refused, where the parties had agreed that the appeal should be heard after the expiration of the three months allowed by the Rules of Court. *Kirstein* vs. *Gronum* 166

ARBITRATION.—See Award.

ARREST.—See Landdrost.

—— The arrest of applicant under a criminal warrant, issued by a Magistrate in Griqualand West, and countersigned by the Attorney-General of the Transvaal, with a view to the extradition of applicant, set aside as being contrary to the provisions of Ordinance No. 5, 1871. Ex parte *Lithauer* 38

—— To found jurisdition. Ex parte *Rehbock* 103

—— Of a *Peregrinus*. *Twycross* vs. *McHattie* 198

—— See Leave of Absence.

ARTICLES OF WAR.—See Volunteer Corps.

ASSAULT.—Although an action for damages for assault will lie, notwithstanding a previous criminal conviction of defendant for such assault, a Landdrost ought not to try the civil action where the conviction is still pending in review before the High Court, *Williams* vs. *Young* 134

PAGE

ATTORNEY.—An Advocate and Attorney, who had been employed by his client to pass transfer of certain farms, and had received £11 14s., the amount of necessary charges for the purpose, kept back his client's money for more than two years, without expending it for the purpose intended, or passing transfer as instructed; *Held*, that this was an act of professional misconduct, which the Court could not overlook, and the respondent was accordingly suspended from practice for the period of twelve months. *Van Wijk* vs. *Krige* 39

—— Circumstances which will induce the Court to refuse admission to an applicant as attorney, will also, as a general rule, justify the Court in dealing summarily with an attorney already admitted. *Ibid.*

—— Where, upon the affidavits, the Court can not arrive at a definite conclusion beyond reasonable doubt, it will not interfere summarily until a conviction against the attorney has first taken place. *Secus*, where the charges are admitted by the attorney, or where they are established beyond reasonable doubt. *Ibid.*

—— An attorney who merely collects money for a client is in the same position as an agent, and can only charge the percentage for collection allowed to agents by § 15 of Ordinance No. 2, of 1871. Ex parte *McGregor* 56

—— Where an attorney acted as an ordinary agent, the Court refused to make absolute a rule *nisi* against him for a specific account. *King* vs. *Henderson* 171

—— Fees of attorneys under Ordinance No. 2, of 1871, § 13, discussed. *Van Breda* vs. *Johnstone* 193

ATTORNEY-GENERAL.—See Preliminary Examination.

AWARD.—An order, making an award a Rule of Court, set aside. *Leathern* vs. *Henderson* 46

—— A client will not be bound by a submission to go to arbitration, signed by his attorney, contrary to express instructions of the client, where such instructions were known to the opposite party, or his attorney, who, notwithstanding, executed the deed of submission. An award under such deed of submission is a mere nullity; and, on action brought, the Court set aside an order whereby the award had been made a Rule of Court. *Ibid.*

BAIL.—See Sheriff.

BANK BOOKS.—See Inspection.

BANKING COMPANY.—An unincorporated Joint-stock Banking Company cannot sue through its General Manager. *Cape Commercial Bank* vs. *Schröder & Co.* 161

BANKRUPTCY, FOREIGN.—H., a debtor residing in the Free State, gave a promissory note, payable at the Oriental Bank, Bloemfontein. His estate was subsequently adjudicated bankrupt in the Free State, and a trustee appointed. H. afterwards removed to the Transvaal, and was sued before the Landdrost of Pretoria on the promissory note by the payee, who was domiciled in the Free State, and had not proved any claim in the insolvent estate. The Landdrost admitted affidavits sworn in the Free

PAGE

State in evidence, and gave judgment against H. with costs. On appeal, the Court reversed the judgment below, with costs. *De Hart* vs. *Steyn* 132

BAR.—Notice of Bar. *Brodrick* vs. *Leathern* 139

—— Where a defendant had been barred from pleading, and leave to purge default had been refused him, the Court allowed his counsel at the trial to cross-examine the plaintiff's witnesses. *Leathern* vs. *Brodrick* 43

BILL OF COSTS.—Provisional sentence on a taxed bill of costs in favour of an attorney refused, where the defendant objected that the attorney had no power to appear and act for him *Zeiler* vs. *Hollins & Holder* 255

BOND.—See Mortgage Bond.

CANCELLATION OF LEASE.—See Lease.

CARRIER.—See Goods in Transitu.

—— See Transhipment.

—— See Delivery.

COLLECTION.—See Good-for.

—— See Attorney.

COLLUSION.—Where, after the plaintiff had determined to sue for a divorce, he proposed a marriage between his wife and her adulterer, and consented to provide the wife with money to support herself during the continuance of such illicit union, a marriage between the wife and her adulterer being forbidden by Roman Dutch Law, the Court dismissed his summons for divorce *a vinculo*. *Weatherley* vs. *Weatherley* 66

COMMISSION "DE BENE ESSE."—A Commission *de bene esse* refused, where the plaintiffs resided in Natal, and the defendant in the Free State, but had immoveable property in the Transvaal. *Tipper & Good* vs. *Van den Burg* 112

—— Commission *de bene esse* granted, where the application was for the examination of two witnesses who were named, and any other witnesses that may be produced by either party to the suit. *Curator of Marais' Estate* vs. *Cloete* 187

—— The general rule is that a Commission *de bene esse* will not be granted before pleadings have been closed. *Don* vs. *Erasmus* .. 254

COMPOUND INTEREST.—A summons based on an account, charging compound interest, is not on that ground bad in law. *Compton* vs. *Williams* 160

COMPULSORY SEQUESTRATION.—See Sequestration.

CONDITION.—See Recognizance.

CONDITION PRECEDENT.—Where the appellant had agreed to return certain oxen, or their value, which he had exchanged for a horse with the respondent, if the latter brought him the skin of the horse in case it should have died of horse-sickness; *Held*, that this was not a condition precedent, and that there being satisfactory evidence that the horse had died of horse-sickness, the respondent was entitled to sue for return of the oxen or their value, although he had failed to bring the horse's skin to appellant. *Perrin* vs. *Potgieter* 61

PAGE

CONDONATION.—To establish condonation, there must be evidence that the plaintiff agreed to take the defendant back as his wife, *rectam et integrum*. *Weatherley* vs. *Weatherley* 66

CONNIVANCE.—Connivance exists where the plaintiff, by his acts and conduct, has either knowingly brought about, or conduced to, the adultery of his wife; or where he has so neglected or exposed her to temptation, as under the circumstances of the case he ought to have foreseen would, if the opportunity offered, terminate in her fall. So, where the plaintiff, having become aware of an improper intimacy existing between his wife and the co-respondent, remains passive and permits the intimacy to continue, taking no steps to protect his wife and to avert the coming danger, he will be held to have connived at her subsequent adultery. *Weatherley* vs. *Weatherley* 66

CONTEMPT OF COURT.—What amounts to Contempt of Court. In re *Phelan* 5

CONVICTION.—A conviction by an Acting Landdrost quashed, where such Landdrost had also acted as prosecutor against the prisoner, and had not been properly appointed Public Prosecutor. *Breytenbach* vs. *The Queen* 55

—— A conviction quashed, where the evidence against the prisoner was not given in his presence, nor under oath. *The Queen* vs. *David Lynx* 110

—— A conviction quashed on the ground that the Record did not show that the accused had been called on to plead. *Gouws* vs. *The Queen*.. .. .. *(in notis)* 143

CONVICTION FOR ASSAULT.—See Assault.

CO-OWNER.—See Joint Owner.

COSTS.—An attorney, under certain circumstances, not allowed his costs as between attorney and client. *Uys* vs. *Uys* 57

—— A *peregrinus* must give security for costs. *Van Blerk* vs. *Hollins & Holder* 128

Don vs. *Erasmus* 254

—— See Provisional Sentence.

CRIMINAL SUMMONS.—See Non-appearance.

CRIMINAL TRIAL.—See Postponement.

CROWN.—The Crown has no power under terms of the Annexation Proclamation of 12th April, 1877, to legislate for the territory of the Transvaal. *White & Tucker* vs. *Rudolph* 116

CURATOR.—See Executors.

—— A Curator *ad litem* appointed to a minor beyond the jurisdiction. Ex parte *Van Manen* 259

—— See Lunatic.

CURATRIX.—See Wife.

CUSTOM.—By the Civil Law, and the Roman Dutch Law, a general custom may abrogate a written law. Such custom must, however, be reasonable, ancient, and properly proved by acts and deeds. *Zeiler* vs. *Weeber* 17

DEBTOR.—See Sheriff.

DECLARATION.—Declaration following arrest. Rule VII. prescribes

PAGE

that where a defendant has been arrested, a declaration shall be served upon him within 48 hours after execution of the arrest. Where, therefore, a declaration was served on defendant's attorney within 48 hours after the Sheriff had made his return to the writ of arrest, although the defendant had been arrested seven days previously; *Held*, that the words "48 hours after execution of the arrest" meant 48 hours after filing of the Sheriff's return of the execution of the process of arrest, and that the declaration had been served in time. *Zeiler & Co.* vs. *Sheppard* 253

DEFAMATION.—In an action for damages by reason that the defendant had stated the plaintiff had made a false declaration in the witness-box; *Held*, upon the evidence, that absolution from the instance must be granted. *Kleinhans* vs. *Cronjé* 129

—— See Slander.

DEFAULT.—An application to purge default refused. *Brodrick* vs. *Leathern* 139

—— Judgment pronounced against a defendant in default. *Celliers* vs. *Boshoff* 200

DELIVERY.—In the absence of anything manifesting a contrary intention on the part of the vendor, delivery to a carrier is delivery to the vendee. *Welsh* vs. *Bernhard, Cohen & Co.* 192

DELIVERY.—Delay in delivery. A carrier is liable for damages caused by unreasonable delay in the delivery of goods. *Coventry Brothers* vs. *Kingsmill* 203

DEPOSITARY.—Sale and pledge by a Depositary. The mere possession of property belonging to another, without any authority to deal with the property otherwise than for the purpose of safe custody, will not, if the person so in possession takes upon himself to sell, or pledge it to a third party, divest the owner of his rights as against the third party, however innocent in the transaction the latter may have been. *Perrin* vs. *Turton* 25

DEPOSITION.—The deposition of an absent witness, who had not been bound over to appear at the trial under § 51 of the Criminal Procedure Act, 1864, rejected by the Court. *The Queen* vs. *Davis* 173

DESCRIPTION.—Description of parties in a summons. What is a sufficient description. *Conradie* vs. *Dunell, Ebden & Co.* .. 227

DIAGRAM.—Law No. 5 of 1870, § 8, merely refers to diagrams of corporeal things, which can be surveyed, and not also to incorporeal things *quæ tangi non possunt*. *Municipality of Potchefstroom* vs. *Cameron* 206

—— See Notice of Publication.

DIVORCE.—A fresh summons praying for divorce *a vinculo* is not necessary where, in the summons for a decree of restitution of conjugal rights, it is stated that on non-compliance with the order to return to cohabitation, application will be made for a decree *a vinculo*. *Truter* vs. *Truter* 34

—— Such fresh summons, however, held necessary. *Erasmus* vs. *Erasmus* .. .. (*in notis*) 35

—— See Jurisdiction,

PAGE

DOMICILE.—To constitute a domicile of choice, these two essentials must concur: (1.) Actual residence in the new place or country. (2.) An intention of remaining there so as to make it one's permanent home. *Weatherley* vs. *Weatherley* 66

DONATION.—Where a donation *inter vivos* of land had been made by a grandfather in favour of his grandson, a minor, and accepted by the father of the minor on his behalf; *Held*, that an action lay to compel transfer of the land in favour of the minor. *Barrett* vs. *Executors of O'Neil* 104

EDICTAL CITATION.—Leave to sue a debtor, residing beyond the jurisdiction, by edictal citation granted. Ex parte *Rehbock* 103

EJECTMENT.—Where the plaintiff had, at an execution sale, bought a farm belonging to the defendant, and had obtained transfer thereof; *Held*, that he could not succeed in an action of ejectment against the defendant, because of an irregularity in the writ under which the farm was sold in execution, and because there was no prior attachment of the moveable property of the defendant, nor any return by the messenger of *nulla bona*. *Zeiler* vs. *Rosseau* 35

—— See Summons.

EVIDENCE.—No oral evidence of the contents of a mortgage bond can be admitted unless the absence of the bond has first been satisfactorily explained. *Reed* vs. *Lee* 130

—— Affidavits held inadmissible in evidence in a principal case. *De Hart* vs. *Steyn* 132

—— The evidence of the plaintiff in a suit for divorce ought not to be taken on commission. Ex parte *Rens* 134

—— The evidence of a witness admitted against a native woman with whom he was cohabiting. *The Queen* vs. *Fleischman and Katryn* 172

—— Is the evidence of a native woman, prisoner's second wife by Kafir law, admissible against him? *The Queen* vs. *Sepana* .. 172

EXCEPTION.—An exception to a summons upheld, where the summons contained no date, and copies of the original documents, annexed to the summons, had not been served upon defendant, as required by Rules viii. and xiii. *Loots* vs. *Van Vuren* 57

—— See Married Woman.

—— See Secretary to Government.

EXECUTION.—Sale in Execution.—See Ejectment.

—— An execution creditor, who has seized moveable property in execution, in the hands of the debtor, will be preferred to a mortgagee, who claims the property by virtue of a mortgage bond, unaccompanied by delivery. *Reed* vs. *Lee* 130

EXECUTORS.—Removal of Executors. Where the executors of an estate did not file proper liquidation accounts, and kept open the liquidation of the estate for three years; *Held*, that, upon application supported by the Orphan Master, the liquidation of the estate must be placed in the hands of a curator. *Boshoff* vs. *Boshoff's Executors* 49

EXTRADITION.—See Arrest.

PAGE

FEES.—Fees for consultation in an appeal case not allowed as between party and party. *Poultney* vs. *The Master* 200

FOREIGN BANKRUPTCY.—See Bankruptcy.

FOREIGN MARRIAGE.—Dissolution of foreign marriage. *Weatherley* vs. *Weatherley* 66
and see Jurisdiction.

FRAUD.—See Lease.

GAMBLING.—See Good-for.

GENERAL ISSUE.—See Plea.

GOOD-FOR.—An action cannot be maintained on a "good-for" given in payment of money lost at playing cards. Nor can an agent, to whom the "good-for" is handed for collection merely, sue on it in his own name. *Lucas* vs. *Reston* 45

GOODS IN TRANSITU.—A carrier is only liable for the actual damage to goods *in transitu*, and can not be compelled by the consignees to take over the damaged goods at cost price. *Welsh* vs. *Bernhard, Cohen & Co.* 192

GRONDWET.—§ 191, *Page* vs. *Hudson* 230

—— § 163, *Celliers* vs. *The Queen* 237

—— § 143, ,, vs. ,, ... ,,

—— § 219, ,, vs. ,, ... ,,

—— § 220, ,, vs. ,, ... ,,

HEIR.—Liability of an heir for debts due by the estate. *Cooper* vs. *Jocks* 201

HIGH COURT PROCLAMATION.—*Rudolph* vs. *White & Tucker* 135

HUSBAND.—Absence of husband. See Adultery.

HYPOTHEC.—Landlord's hypothec for rent on *omnia invecta et illata*. The goods of a third party, found in the house occupied by the lessee, are subject to the lessor's hypothec for rent, provided the goods were brought into the house with the consent of their owner, and for the purpose of *permanently* remaining therein *for the use of the lessee*. *Longlands* vs. *Francken* 256

ILLEGALITY.—A condition imposed by Government in a contract of sale, that a farm shall be sold without payment of transfer duty, is illegal. *Page* vs. *Hudson* 229

INDICTMENT.—Indictment for Theft.—The Court refused to amend an indictment for theft by substituting 8th December, 1879, for 8th March, 1879. *The Queen* vs. *Smith* 173

INFORMALITY.—See Preliminary Examination.

INHERITANCE.—Adiation of Inheritance.—Where the defendant was heir-in-right of his wife in the estate of the testator, and gave instructions to sue for recovery of a debt due to the estate, receiving at the same time an advance of £35 on such debt; *Held*, that he had adiated the inheritance, and was liable for the debts of the estate. *Cooper* vs. *Jocks*. 201

INSANITY.—Plea of insanity on an indictment for murder. *The Queen* vs. *Booth* 50

INSOLVENT.—Action by an insolvent. *Perrin* vs. *Turton* 25

PAGE

INSPECTION.—An order for inspection of Bank books in the custody of the opposite party refused. *McHattie* vs. *Twycross* 190

INSPECTORS' INSTRUCTIONS.—The Inspectors' Instructions of 1861, § 12, do not relate back to farms inspected in 1853. *Du Toit* vs. *Hudson* 220

INTERDICT.—Under § 55 of the Civil Procedure Act of 1874, a Landdrost can not grant an interdict against property situate within his district, but possessing a value above the jurisdiction of the Landdrost. *Spies* vs. *Holtshausen* 59

—— The proper form of proceeding, where applicant complains that respondent has diverted water from a public stream, to the detriment of his mill, is by action, and not on motion for an interdict. *Dore* vs. *Meintjes* 101

—— An interdict will be refused where the applicant has an adequate remedy by action. *Gaisford* vs. *Marais & Co.* 111

—— An application for an interdict will be refused, where no clear right is established by the applicant. Ex parte *Bok* 167

—— An interdict granted under § 55 of the Civil Procedure Act of 1874. Ex parte *Fox, James, and Jones* 168

—— See Joint-owner.

—— An interdict granted restraining the transfer or mortgage of immoveable property by the registered owner thereof. Ex parte *Zeiler* 226

IRREGULARITY.—See Preliminary Examination.

JOINT-OWNER.—A joint-owner of an undivided farm is not entitled, as against the other co-owners, to convert pasture into arable land, nor can he indiscriminately cut down old and young trees on the farm. These are acts which may be restrained by interdict. *Botha, Smith, and others* vs. *Kinnear* 215

—— If the other co-owners first suffer an alteration to be made, and then, after its completion, seek to have the alteration removed, the application comes too late, and they must rest content with their claim to be indemnified, by the defendant, for any loss or infringement of their rights caused thereby. *Ibid.*

JURISDICTION.—See Landdrost.

—— The mere consent of the parties, in questions involving their matrimonial status, can not give the Court jurisdiction, where, in the absence of such consent, the Court would not have jurisdiction. *Weatherley* vs. *Weatherley* 66

—— The Court can, of its own mere motion, and in the absence of a declinatory exception pleaded by defendant, raise the question of jurisdiction. *Ibid.*

—— The Court has jurisdiction, on the ground of adultery committed in the Transvaal, to dissolve a marriage contracted in England between parties, whose domicile is English, but who are *bona fide* resident in the Transvaal. *Ibid.*

LAND COMMISSION.—See Appeal.

LANDDROST.—See Preliminary Examination.

PAGE

—— A Landdrost has no jurisdiction to grant a writ of arrest against the person and goods of a debtor, where the debt amounts to £40, and is not proved by a liquid document or acknowledgment of debt. *Muller* vs. *Van der Heide* 17

—— Jurisdiction of.—One and the same cause of action, exceeding in amount the jurisdiction of the Landdrost, cannot be split into three in order to bring the three separate demands within such jurisdiction. *Bourhill* vs. *Watson & Co.* 54

—— Conviction by Landdrost quashed.—See Conviction.

—— See Interdict.

LANDDROST COURT.—The High Court does not scrutinize too closely the pleadings in the Landdrost Court, as long as substantial justice has been done. *Conradie* vs. *Dunell, Ebden & Co.* .. 227

—— See Seditious Libel.

LANDLORD.—Landlord's hypothec for rent on *omnia illata et invecta*. See Hypothec.

LAW.—See Ordinance. *Grondwet*.

LEASE.—Lease of a farm executed in fraud of a prior mortgagee set aside. *Cape Commercial Bank* vs. *Fleischman* 1

—— Cancellation of a Lease.—The lease of a house cancelled where the tenant had not observed the conditions of the lease, and where the lessor had immediate need of the house for himself and family. *Loxton* vs. *Fayhirst* 33

—— Abatement of rent will not be allowed where the lessee has been disturbed in the enjoyment of the premises leased by the *tortious* act of a third party. *Rex* vs. *Stamp* 63

—— Cancellation of. Where a lessee ceased to pay rent, allowed the premises leased to go to ruin, and had abandoned them; *Held*, that the lessor was entitled to a cancellation of the lease and to damages. *Stamp* vs. *Rex* 147

LEAVE OF ABSENCE.—The Orphan Master, a public officer, had obtained three months' leave of absence to proceed to Europe. On the morning of his departure, an application was made by the Colonial Secretary for the arrest of the Orphan Master, on the ground that the books and accounts of his office had not been audited. The application was refused. Ex parte *Hudson* 224

LESSEE.—See Lease.

LESSOR.—See Lease.

LUNATIC.—See Practice.

—— A Curator *ad litem* appointed by the Court to an alleged lunatic. A provisional Curator may also be appointed to manage the alleged lunatic's property in the meantime. Ex parte *Dargon* 146

—— Ex parte *De Hart* 190

MARRIAGE CERTIFICATE.—The signature of a minister to a certificate of marriage, contracted in the Cape Colony, must be duly proved. *Nyshens* vs. *Nyshens* 146

MARRIED WOMAN.—Where the plaintiff, a married woman, sued as executrix of her first husband's estate, for money due to the estate, without the assistance of her second husband; *Held*,

PAGE

upon exception to the summons, that the exception was well taken. *Van Eeden* vs. *Kirstein* 182

MARTIAL LAW.—See Provisional Sentence.

MINOR.—The validity of a title deed of property, registered in the name of a minor, will not be questioned, unless an action be brought to set aside the title-deed or transfer. In re *Roselt & Inglis* 13

—— A purchase on behalf of a minor will not be set aside, unless it appear that such would be for the benefit of the minor. *Ibid.*

—— The Court will not sanction the dealing with landed property belonging to a minor, without previous judicial consent first had and obtained. *Ibid.*

—— Land registered in name of a minor.—In an action by a jugdment creditor of the father, the Court refused to set aside a *bona fide* transfer of land registered in the name of his minor son, the purchase price for which had been paid by the father. *Russell* vs. *Van Grassouw* 112

—— Provisional sentence granted against a minor on a promissory note signed by him. *Johnstone* vs. *Keiser* 166

MORAL CLAIMS.—The Court does not entertain moral claims. *Jacobs* vs. *The Queen* 173

MORTGAGE BOND.—See Lease.

MORTGAGE.—A mortgage of moveables, unaccompanied by delivery, must be postponed to the claim of a judgment creditor, who has seized the moveables in execution. *Reed* vs. *Lee* 130

MUNICIPAL ELECTION.—A burgess of Pretoria, Lambertus G. Vorstman, soda-water manufacturer, was described on the burgess roll as C. Wisman, Soda-water Manufacturer. At an election of Borough Councillors, he filled in his voting card as follows: "Lambertus G. Vorstman (C. Wisman), Soda-water Manufacturer, &c.;" *Held*, that as the polling officer had satisfied himself as to the identity of the burgess, his vote had not been improperly received. *D'Arcy* vs. *Skinner and Green* 231

—— Law No. 16 of 1880, § 27, does not prescribe that a voter must personally sign his voting card, but only himself hand it in to the polling officer. *Ibid.*

—— § 27 of Law No. 16, of 1880, does not require a voter to state his occupation on his voting card, but only his description. *Ibid.*

MURDER.—See Prisoners' Statements.

—— Indictment for murder, and plea of insanity thereto. *The Queen* vs. *Booth* 50

MUTINY ACT.—See Volunteer Corps.

NECESSITY.—The meaning of the maxim *necessitas non habet legem, quod cogit defendit*, is not that necessity over-rides all law and is superior to it; but that the law justifies in certain cases, as where the safety of the State is in imminent danger, a departure from the ordinary principles protecting the subject in his right of private property. It is not every necessity that will justify a

PAGE

departure from the ordinary principles of law. It must be necessity extreme and imminent. *White & Tucker* vs. *Rudolph* .. 115

NOMINAL DAMAGES.—See Volunteer Corps.

NON-APPEARANCE.—The applicants, having appeared in obedience to a criminal summons, applied for an extension of time to answer the charge against them. The Landdrost thereupon postponed the further hearing until a given day, when he would decide whether the application for time should be granted or not. The accused did not appear on the given day, when the Landdrost refused the application for time, and convicted the applicant; *Held*, that their non-appearance on the given day did not deprive them of the right to appeal against the conviction, and that § 108 of the Criminal Procedure of 1864 did not apply. *Gouws* vs. *The Queen* 141

—— Non-appearance of witnesses at a criminal trial.—See Postponement of Criminal Trial.

NOTICE.—Notice of publication of a diagram ordered to be set aside, where there was no endorsement by the Surveyor-General on the diagram, as required by Law No. 5 of 1870, § 8. *Municipality of Potchefstroom* vs. *Cameron* 206

NOTING EXPENSES.—See Provisional Sentence.

ORDINANCE No. 5, 1864, § § 1, 2, 3, 4, 7, *Celliers* vs. *The Queen* .. 237
—— ,, ,, § 8, *litt. d. Breytenbach* vs. *The Queen* 55
—— ,, ,, § § 10-13 ,, ,, ,, ... 55
—— ,, ,, ,, ,, *Celliers* vs. *The Queen* 237
—— ,, ,, § 14, *Attorney-General* vs. *Skinner* 4
—— ,, ,, § 51, *The Queen* vs. *Davis* 173
—— ,, ,, § 52, ,, vs. *Saul* 32
—— ,, ,, § 57, Attorney-General vs. *Skinner* 4
—— ,, ,, § 70, *The Queen* vs. *Botha* 189
—— ,, ,, § 77, *Gouws* vs. *The Queen* 142
—— ,, ,, § 95, *The Queen* vs. *Potts* 115
—— ,, ,, ,, ,, vs. *Botha* 145
—— ,, ,, ,, ,, vs. ,, ... 189
—— ,, ,, § 108, *Gouws* vs. *The Queen* 141
—— ,, ,, § 121, *The Queen* vs. *Fleischman and Katryn* .. 172
—— ,, ,, § 128, ,, vs. *Davis* 173
—— No. 5, 1870, § 8, *Potchefstroom Municipality* vs. *Cameron* .. 185
—— ,, ,, ,, ,, ,, vs. ,, ... 206
—— No. 12, 1870, (Weeswet), In re *Oosthuysen* 98
—— No. 2, 1871, § 5, *Cloete* vs. *The Government* 175
—— ,, ,, § 13, *Van Breda* vs. *Johnstone* 193
—— ,, ,, § 15, Ex parte *McGregor* 56
—— No. 5, 1871, Ex parte *Lithauer* 38
—— No. 1, 1874, § 1 (Crim. Procedure), *Celliers* vs. *The Queen* .. 237
—— ,, ,, § 8, *Gouws* vs. *The Queen* 142
—— ,, ,, § 39 (Civ. Procedure), *Lubbe* vs. *Genis* 171
—— ,, ,, § 55 ,, ,, *Muller* vs. *Van der Heide* .. 17
—— ,, ,, ,, ,, ,, *Spies* vs. *Holtshausen* .. 59
—— ,, ,, ,, ,, ,, Ex parte *Fox, James, & Jones* 168

PAGE

—— No. 1, 1874, § 103 (Crim. Procedure), *Gouws* vs. *The Queen* .. 142
—— ,, ,, § 128 ,, ,, *The Queen* vs. *Davis* .. 173
—— ,, 16, 1880, § 27, *D'Arcy* vs. *Skinner and Green* 231

PAUPERIS, IN FORMA.—Leave to sue *in forma pauperis* refused. *Leathern* vs. *Surtees* 100
PAYMENT.—The defence of payment must be specially pleaded. *O'Reilly* vs. *Leathern* 62
PEREGRINUS.—Arrest of *Peregrinus*. *Twycross* vs. *McHattie* 191
PERJURY.—See Re-opening of case.
PERPETUAL SILENCE.—Where a preliminary examination had been kept open for seven months; *Held*, that a decree of perpetual silence could not be granted against the Crown. Ex parte *Bok* 223
PLACAAT.—The Placaat of Charles V., Anno 1540, art. 6, applies to all ante-nuptial contracts by which property is settled upon, or secured to, wives by their husbands, whether Merchants or not. *Curator of Van der Merwe's Estate* vs. *Van der Merwe* 148
PLEA.—A plea of no property in the plaintiff means no property as against the defendant. *Perrin* vs. *Turton* 25
—— Plea of the General Issue.—A defendant cannot raise the defence of payment under the general issue. *O'Reilly* vs. *Leathern* 62
—— It is not competent for a defendant to plead the general issue, and then a plea of tender to the same cause of action. *Beeton* vs. *Wemmer* 101
PLEADING.—See Description of Parties.
—— See Landdrost Court.
POSTPONEMENT.—An application for a postponement of a criminal trial refused, where no attempt had been made to *subpœna* certain witnesses, whose evidence, it was alleged, was material. *The Queen* vs. *Potts* 115
—— A criminal trial postponed on the ground of absence of material witnesses. *The Queen* vs. *Botha* 145
—— A criminal trial was postponed, on the ground of absence of material witnesses, to the following session of the Court. At such following session the witnesses were still absent; the Court directed the accused to be discharged. *The Queen* vs. *Botha* 189
POWER TO SUE OR DEFEND.—See Agent.
PRACTICE.—The Court will not declare a person lunatic upon affidavits merely. In re *Petersen*.. 13
—— Where the plaintiff described himself as Secretary to the Board of Executors, Potchefstroom; *Held*, that he could, in his own name, maintain an action on a "good-for" given him by the defendant. *Evans* vs. *Watermeyer* 58
—— See Spoliation.
PRELIMINARY EXAMINATION.—Where the Attorney-General directs a Public Prosecutor to re-open a preliminary examination, and take further evidence before the Landdrost, the Landdrost cannot refuse to take such evidence. *Attorney-General* vs. *Skinner* 4
—— An informality, or irregularity, in the taking of a preliminary examination, affords no ground of objection for a prisoner not

PAGE

to plead to an indictment against him before the jury. *The Queen* vs. *Joseph* 131

PRELIMINARY EXAMINATION.—See Perpetual Silence.

PRESENTMENT.—Proof of presentment of a promissory note, at the place where it is made payable, cannot be made by affidavit in a case for provisional sentence. There must be a proper notarial certificate. *Simpson* vs. *Lemkuhl* 140

PRINCIPAL.—See Agent.

PRISONERS' STATEMENTS.—The statements of prisoners, who had been duly cautioned, as required by law, received in evidence against them, where such statements were made after committal by the Landdrost on a charge of murder. *The Queen* vs. *Saul* 32

PRIVY COUNCIL.—See Appeal.

PROMISSORY NOTE.—Where a promissory note is specially indorsed to the local manager of an unincorporated Banking Company, or order, he can maintain an action on it in his own name. *Cape Commercial Bank* vs. *Schröder* 161

—— Promissory note signed by agent, see Provisional Sentence.

PROROGATION OF JURISDICTION.—See Jurisdiction.

PROVISIONAL SENTENCE.—Provisional sentence granted on a promissory note against a minor. *Johnston* vs. *Keiser* 166

—— Provisional sentence granted against the maker and indorser of a promissory note not made to order. *Turton* vs. *Sargeant and others* 170

—— Provisional sentence refused on a promissory note signed by M., as agent, on behalf of B., the principal, no power of attorney in favour of the agent so to do being produced. *Harsant* vs. *Recker & De Vries* 236

—— Provisional sentence refused on a taxed bill of costs in favour of an attorney, where the defendant objected that the attorney had no power to appear and act for him. *Zeiler* vs. *Hollins & Holder* 255

—— The defendant to a claim for provisional sentence on a promissory note objected to pay the noting expenses, on the ground that the existence of Martial Law rendered presentation and noting unnecessary; *Held*, that the objection was untenable. *Meintjes* vs. *Meintjes* 252

PUBLIC MEETING.—See Trespass.

PUBLIC STREAM.—See Water.

RECOGNIZANCE.—Where the applicant did not comply with the condition of a recognizance; *Held*, that the recognizance was properly estreated. *Jacobs* vs. *The Queen* 173

REGISTRATION.—A conveyance of land *coram lege loci* is equivalent to registration. *Barrett* vs. *Executors of O'Neil* 104

RENT.—Abatement of Rent.—See Lease.

RE-OPENING OF PRELIMINARY EXAMINATION.—*Attorney-General* vs. *Skinner* 4

RE-OPENING OF CASE.—Where the applicant alleged that one J., a witness, had at the trial committed perjury, and prayed for a

PAGE

re-opening of the case after judgment had been given, the Court refused the application, because the evidence of J. had been materially corroborated by L., another witness, and there was no allegation that L. had sworn falsely. *Mears* vs. *Leathern* .. 169

RESIDENCE, *bona fide*.—See Jurisdiction.

RETORT.—See Slander.

RETURN.—See Sheriff.

RIPARIAN PROPRIETOR.—See Water.

RULES OF COURT.—Rule vii., *Twycross* vs. *McHattie* 198

—— Rule vii., *Zeiler & Co.* vs. *Sheppard*.. 253

—— Rule viii., *Loots* vs. *Van Vuren* 57

—— Rule viii., *White & Tucker* vs. *The Administrator* 127

—— Rule xiii., *Loots* vs. *Van Vuren* 57

—— Rule xxiv., *Brodrick* vs. *Leathern* 139

—— Rule xxxv., *Rudolph* vs. *White & Tucker* 135

—— Rule lxiii., *Leathern* vs. *Surtees* 100

—— Rule xxxix., *Kirstein* vs. *Gronum* 166

SECRETARY TO GOVERNMENT.—The plaintiffs brought an action against C. for cancellation of a notice of publication of a diagram, and joined the Secretary to Government as co-defendant. Upon exception that the summons disclosed no right of action against the Secretary to Government; *Held*, that the exception was well-founded. *Potchefstroom Municipality* vs. *Cameron and Shepstone* 185

SEDITIOUS LIBEL [per De Wet, C. J.]—A Court of Landdrost has jurisdiction, under the Criminal Procedure Act of 1864, to try and punish a case of seditious libel.—*Celliers* vs. *The Queen* .. 237

—— [per Kotzé, J.] A Court of Landdrost has no such jurisdiction. *Ibid.*

SEQUESTRATION.—The right of creditors, under Roman-Dutch Law, to pray sequestration of their debtor's estate, is not taken away by art. 71 of the Volksraad Resolutions of 1852, which merely prohibits the voluntary surrender by a debtor of his estate. *Zeiler* vs. *Weeber* 17

—— Foreign Sequestration. The Court will give effect to a foreign assignment in bankruptcy, or sequestration of a debtor's estate, in so far as the personal property of such bankrupt or debtor is concerned. *Perrin* vs. *Turton*.. 25

—— The foreign sequestration of plaintiff's estate at the Diamond Fields, although it vests his personal property in this territory in his trustee, does not prevent the plaintiff from bringing an action against defendant for recovery of certain quicksilver, or its value. *Ibid.*

SERVITUDE.—See Watercourse.

—— The mere reference in a transfer of land to a deed of sale, granting the right of grazing, &c., over adjoining land, is not sufficient to create a servitude as against a third party, who is a purchaser for value. *Botha, Smit, and others* vs. *Kinnear* 215

SHERIFF.—Action against the Sheriff. *Van der Merwe* vs. *Turton and Juta* 156

PAGE

SHERIFF.—The Sheriff directed to pay out certain funds in his possession belonging to defendant, in satisfaction of a judgment in favour of the plaintiff. *Archer* vs. *Van Rensburg* 170

—— Late return by Deputy Sheriff. Ex parte *De Pass and Hamilton* 191

—— The Sheriff is bound to receive into custody a debtor surrendered to him by the sureties, in terms of a bail bond. Ex parte *Preller, De Villiers, and Taylor* 222

SLANDER.—Words spoken *in rixa*. Retort. The defendant, having had a quarrel with the plaintiff, said to him, in the hearing of witnesses, "You are a thief and swindler." These words were addressed to the plaintiff after he had called the defendant a "d——d little sweep, &c."; *Held*, that the words "thief" and "swindler" were used *in rixa* and *ab iræ impetu*, and had been compensated by what the plaintiff had said of the defendant. *Herschenssohn* vs. *Cohen* 255

SPECIAL INDORSEMENT.—See Promissory Note.

SPLITTING OF DEMANDS.—See Landdrost.

SPOLIATION.—Where, under an illegal order, the store of the applicants, who were licensed dealers in wines and spirits, had been forcibly entered, and the stock of liquor therein seized and removed; *Held*, that, although an action might have been brought by them, the applicants were entitled, on motion, to an order directing the immediate restoration of the liquor so seized, for *spoliatus ante omnia restituendus est*. *White & Tucker* vs. *Rudolph* 115

SUMMONS.—A summons, containing a prayer for ejectment against defendant, and also a prayer for compensation in damages at £5 per month, by reason of unlawful occupation by defendant, is not inconsistent. *Van Rensburg* vs. *Swart* 99

SUMMONS.—A summons taken out against a defendant, who died before it was served on him, ordered to be amended by substituting the executor as defendant. *Preller & De Villiers* vs. *Muller* 10

SURRENDER OF DEBTOR BY HIS BAIL.—See Sheriff.

SUSPENSION FROM PRACTICE.—See Attorney.

TENDER, PLEA OF.—See Plea.

THEFT.—Theft is a continuous crime. *The Queen* vs. *Herbst* 187

—— Theft by a debtor of property belonging to his sequestrated estate under Roman-Dutch Law, and which property had been left in the debtor's custody by the curators. *The Queen* vs. *Honey* 235

THIRTY-THREE ARTICLES.—§ 9. *Celliers* vs. *The Queen* 237

THROUGH RATE.—See Transhipment.

TITLE DEED.—See Minor.

TRANSFER.—Transfer by a wife of property belonging to her husband's estate, in the absence of such husbond. In re *Oosthuysen* 98

TRANSFER DUTY.—The Government can not exempt a purchaser of a farm from the payment of transfer duty. *Page* vs. *Hudson* .. 229

PAGE

TRANSHIPMENT.—A carrier, who undertakes to carry goods from Durban to Pretoria at a through rate, is not, in the absence of any stipulation to the contrary, prevented from transferring the goods to other wagons *in transitu*, provided no unreasonable delay is thereby caused in the delivery. *Coventry Brothers* vs. *Kingsmill* 203

TRESPASS.—An action will not lie against the defendants for trespass of cattle, the property of persons who attended a public meeting upon the invitation of the defendants. *Ferguson* vs. *Pretorius* .. 157

UNINCORPORATED BANKING COMPANY.—See Banking Company.

VENIA ÆTATIS.—Ex parte *Russell*.. 189

VOLUNTEER CORPS.—Where appellant became a member of a volunteer corps for the period of six months at 5s. per day, and the corps was suddenly disbanded by order of the senior military officer in command at Pretoria; *Held*:

(1.) That the Court had jurisdiction to try an action instituted by the appellant for damages for breach of contract. *Baker* vs. *Saunders*.. 176

(2.) That § 4 of the Mutiny Act, and § 13 of the Articles of War, did not apply to the appellant. *Ibid.*

(3.) That, although no special and substantial damage had been proved by the appellant, he was nevertheless entitled to nominal damages. *Ibid.*

WARRANT.—Countersigning of Warrant.—See Arrest.

WATER.—The ordinary use of running water is that which is required for domestic purposes and the support of animal life. The extraordinary use consists in the application of the water for agricultural purposes, the driving of machinery and the like. *Baillie* vs. *Hendriks, Hoffman, and Browne* 211

—— If an upper riparian proprietor, in the reasonable exercise of the ordinary use, requires all the water in a public stream, the lower riparian proprietor will have no redress; but the upper proprietor can only exercise his right to the extraordinary use of the water consistently with a similar right in the lower proprietor. *Ibid.*

WATERCOURSE.—No deviation or extension can be made in a watercourse or aqueduct within the limits of the servient tenement, but the course originally selected and fixed upon must be adhered to; unless the owner of the servient tenement consents to the deviation or extension. *Municipality of Potchefstroom* vs. *Cameron* 206

WIFE.—A wife appointed curatrix of her absent husband's estate. In re *Oosthuysen* 98

WITNESS.—Absent witness. See Deposition.

WRIT.—Irregularity in a writ. See Ejectment.

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CASES

DECIDED

IN THE HIGH COURT

OF THE TRANSVAAL.

Cape Commercial Bank *vs.* Fleischman and Van Rensburg.

Mortgage Bond.—Lease.—Fraud.

A lease of a farm executed in fraud of a prior mortgage bond, by which the same farm is specially mortgaged as security for the repayment of money lent, will be set aside.

1877
July 24.
„ 27.

Cape Commercial Bank vs. Fleischman and Van Rensburg.

Action brought by the Cape Commercial Bank against the defendants Fleischman and Van Rensburg, for the cancellation of a certain deed of lease of the farm Louwbaken, under the following circumstances:—

The Bank was the holder of a bond whereby the farm Louwbaken was specially mortgaged on 23rd June, 1874, by Fleischman to Von Grassow for the repayment of the sum of £600 with interest after the lapse of one year. On the 16th July, 1874, this bond was ceded by Von Grassow to the Cape Commercial Bank. The plaintiff thereupon complained "that on the 17th September, 1874, after the cession of the said bond had been made, Fleischman, with intent to defeat and delay the said Cape Commercial Bank in selling and realizing, and to materially depreciate the value of, the said farm Louwbaken, mortgaged as aforesaid,

1877
July 24.
" 27.

Cape Commercial Bank vs. Fleischman and Van Rensburg.

did unlawfully and fraudulently make and execute a lease of the said farm Louwbaken for a term of ten years, at a nominal rental of £10 per annum, to, and in favour of, the second defendant, who unlawfully and fraudulently aided the said Fleischman in the execution of the said lease, and accepted the same with intent as aforesaid."

The defendants, while admitting the execution of the said lease, denied that it was founded on any fraud, or prejudiced the creditors of defendant Fleischman in any way, and maintained that the plaintiff was not entitled to judgment, as he had allowed the lease to continue for three years without making any objection, during which period considerable improvements had been effected on the farm.

From the evidence it appeared that the lease of the farm Louwbaken was for a period of ten years, at a rental of £10 per annum and half the annual crops. Fleischman and Van Rensburg were brothers-in-law, and lived on the same farm Louwbaken. The farm had been advertised for sale in execution of a judgment obtained by the Bank in April, 1876, against Fleischman for £500, and costs. One Bekker was willing to purchase the farm for £800, but on hearing of the existence of the lease he refused to complete the purchase. Some time after the lease, Fleischman and his wife cultivated portion of the farm for their own benefit. Improvements were made on the farm by both Van Rensburg and Fleischman. The latter also ordered some repairs and improvements to be made to the dwelling-house, for which he paid. He also cut wood on the farm and sold it on his own account. Evidence was also given of a conversation between Fleischman and Van Rensburg, to the effect that the former would lease Louwbaken to the latter at a rental of £10 per annum, as he feared that the farm might be sold in execution, and he wished to secure the farm. This was denied by defendant Fleischman, but he admitted that he did not inform the Bank, the holder of the mortgage bond, of the lease.

Ford: As to the legal question whether a mortgagor can lease land already mortgaged, without consent of the mortgagee, the Roman-Dutch Law is very vague. (See *Van der Linden*, by *Henry*, p. 181, *Grotius* 2, 48, 44). The English authorities are more clear on the point. (*Chitty on*

Contracts, 9th ed., p. 303. *Snell's Equity*, 245, 248. 1 *Smith, Lead. Ca.* (7th ed.) p. 579. *Keech* v. *Hall*). But even supposing there can be no objection in law to such a lease, the existence of fraud in the execution of the lease will render it void. A clear fraud upon the mortgagee has been proved. The defendants are brothers-in-law, and the lease itself is unusual in its terms. Fleischman was allowed to build new houses and cultivate lands on the farm leased without paying anything for it. He is allowed to cut and remove wood from the farm and act as he pleases, just as if Van Rensburg, the lessee, was not on the farm. The lease has substantially depreciated the value of the farm for purposes of sale by the mortgagee, and there is direct evidence that the lease was entered into for no other purpose than to defeat and delay the mortgagee in obtaining payment of his just debt, in other words, to defraud him.

De Vries, for the defendants, maintained that they could lawfully enter in a contract of lease. The mortgage bond contains no clause preventing this. The English authorities cited do not apply, for the common law of the country is the Roman-Dutch Law, and whatever is not prohibited is not contrary to law. (*Van der Linden* bk. II., ch. I., § III., n. I.) Fraud has not been proved. The defendants have both positively denied this, and it has always been the practice for a mortgagor to lease the premises mortgaged without consulting the mortgagee.

Ford in reply.

Cur. adv. vult.

The Court, upon the evidence, ordered the lease to be set aside with costs.

ATTORNEY-GENERAL *vs.* SKINNER.

Re-opening of Preliminary Examination.

When the Attorney-General directs the Public Prosecutor of a district to re-open a preliminary examination and take further evidence before the Landdrost of such district, the Landdrost cannot refuse to take such further evidence.

1877 October 25. — Attorney-General vs. Skinner.

Ford (Acting Attorney-General) moved for an order directing W. Skinner, Esq., Landdrost of Pretoria, to re-open a preliminary examination in the case of *Reg.* vs. *Ferreira and Potts*. In support of the application, he read the affidavit of J. C. Krogh, Public Prosecutor for the district of Pretoria, setting forth that a preliminary examination having been taken and closed by the Landdrost, he, as Public Prosecutor, submitted the case to the Acting Attorney-General, who instructed him to institute a further preliminary examination, whereupon he summoned the said Ferreira and Potts to appear before the Landdrost for further examination, but that, upon an objection of their attorney, the Landdrost refused to hold such further enquiry. A letter was thereupon addressed to the Landdrost by the Acting Attorney-General in terms of §§ 14 and 57 of the Ordinance No. 5, of 1864, directing him to take the said further examination, which he, however, refused to do. He moved that the application might be granted with costs, and cited *Fisher's Digest*, p. 5688, Criminal Procedure of 1864, §§ 14, 57.

De Vries, for respondent, maintained that a Landdrost is not bound to obey instructions received from the Attorney-General. *The Grondwet* § 62 renders the Landdrost free and independent from Executive control in the discharge of his judicial duties. The Landdrost was only bound by a decision of the High Court. The preliminary examination, having once been closed, could not be re-opened. *Criminal Procedure* § 52.

KOTZÉ, J.: The Landdrost is ordered to re-open the

preliminary examination in the case of *Reg.* vs. *Ferreira and Potts* at the earliest convenient opportunity, and to take further evidence. He must also pay the costs of this application.

1877
October 25.
Attorney-General vs. Skinner.

In re PHELAN.

Contempt of Court.

A paragraph in a newspaper containing improper reflections on the Judge of the High Court in regard to his conduct in an application, which had been heard and decided by him, is a Contempt of Court, which may be inquired into and punished on summary process.

1877
November 29.
December 13.
In re Phelan.

KOTZÉ, J., drew the attention of the Acting Attorney-General to a paragraph in the *Goldfields Mercury* of 22nd November, reflecting in an undue manner upon the proceedings of the Court in the application of *White* vs. *O'Leary*, as follows:—"We don't think any precedent can be found in any law or practice, known in South African Courts, for allowing the Acting Attorney-General to charge both advocate's and attorney's fees; and contrasting this allowance with the Judge's summary and sweeping reduction of Mr. Cooper's bill from thirteen to three guineas, the question very naturally suggests itself to the mind: had Mr. Cooper and the Acting Attorney-General reversed positions, would the Judge's decision have been the same?"

Ford (Acting Attorney-General) thereupon moved for a rule to be served on W. J. Phelan, printer and publisher of the *Goldfields Mercury*, to appear personally before the Court at Pretoria to answer for his contempt.

The Court granted an order directing W. J. Phelan, printer and publisher of the *Goldfields Mercury*, to appear personally on the 13th December, 1877, to answer for Contempt of Court, and to show cause why he shall not be punished or otherwise dealt with according to law.

1877
November 29.
December 18.

In re Phelan.

Postea (Dec. 13). The order having been duly served, and Mr. Phelan being in Court.

Ford (Acting Attorney-General) moved that W. Phelan be called upon to answer for his Contempt of Court.

The Respondent said he did not engage counsel, as he had no intention to defend the charge against him. When he wrote the paragraph in question he had no intention whatever to reflect upon the Court, and did not at the time think he was exceeding the ordinary limit of press criticism. Another construction might, however, be put upon the paragraph different to what he had implied, and on consideration he would not have published it. He had already suffered a penalty in having been put to considerable expense and inconvenience in having to undertake a journey by post-cart from Pilgrim's Rest to Pretoria. His business would also suffer on account of his absence. He thought he might with justice urge this in mitigation, and would now express his regret at what he had done and apologize before His Lordship in open Court. He asked permission to read a few extracts from leading English newspapers on the ruling of Mr. Justice Hawkins in the late *Penge* case, to shew the liberty allowed to the press in England (Mr. Phelan here read extracts from the *Daily News* and other London papers). He did not read these extracts by way of justification for the appearance of the paragraph in the *Goldfields Mercury*, as he did not think it would admit of any, but merely for the sake of mitigating the penalty.

Ford (Acting Attorney-General) did not wish to address the Court after the apology made by Mr. Phelan. He, however, submitted that he should be ordered to pay the costs of this matter.

Kotzé, J.: Mr. Phelan, there cannot be the slightest doubt that in the paragraph in the *Goldfields Mercury*, referred to in the order by which you have been called upon to appear here and answer, you have been guilty of a contempt of this Court. In the *Mercury*, of the 22nd November, you caused to be printed and published a paragraph, reflecting in a very improper manner upon the proceedings

of this Court in the application of *White* vs. *O'Leary*. The paragraph in question most distinctly states, or suggests, it matters not which, that in the case of *White* vs *O'Leary*, the Judge of this Court, in giving his decision from the Bench, was influenced by personal and corrupt motives in allowing on the taxed bill of costs certain fees due to the Acting Attorney-General, and reducing the fees charged by Mr. Attorney Cooper in the Court below. The words in your newspaper, "We don't think any precedent can be found in any law or practice known in South African Courts for allowing the Acting Attorney-General to charge both advocate's and attorney's fees; and, contrasting this allowance with the Judge's summary and sweeping reduction of Mr. Cooper's bill from thirteen to three guineas, the question very naturally suggests itself to the mind: had Mr. Cooper and the Acting Attorney-General reversed positions, would the Judge's decision have been the same?" contain a charge of personal favouritism on the part of the Judge, *quâ* judge. No principle of law is better established than this: that any publications or words which tend, or are calculated, to bring the administration of justice into contempt, amount to a contempt of Court. Now, nothing can have a greater tendency to bring the administration of justice into contempt than to say, or suggest, in a public newspaper, that the Judge of the High Court of this territory, instead of being guided by principle and his conscience, has been guilty of personal favouritism, and allowed himself to be influenced by personal and corrupt motives, in judicially deciding a matter in open Court. In the case of *Re Neethling* (*Buch. Rep.*, 1874), the Supreme Court of the Cape Colony held that to write in a public newspaper that a Judge of the Court, in a certain matter, *sub judice*, "had, in a spirit of humour and *abandon*, given unrestrained license to his tongue," amounted to a contempt of Court. To impute dishonest or improper motives to a Judge in the exercise of his judicial office, is clearly a contempt of Court, of which it is the duty of the Court to take notice by summary process, and to punish the offender by fine, or imprisonmont, or both, at discretion. Under the old state of things in this country, scandalous attacks upon Judges, and improper reflections upon the administration of justice,

1877
November 29.
December 18.

In re Phelan.

may have gone unnoticed and unpunished; not on the ground that the Judges had no power to punish for contempt, for every court of justice possesses this power, but because the judges who composed those courts were mostly unprofessional men, not possessing any knowledge of the principles of jurisprudence. We have now entered upon a new and better administration of justice, and this seems to me the proper occasion to state from the bench what acts amount to contempt of Court. Anything spoken, written, or printed, imputing corrupt and dishonest motives, or conduct, to a judge in the discharge of his judicial office; or reflecting in an improper and scandalous manner on the administration of justice, is a contempt quite as much as insult or violence offered to the judge *in facia curiæ*. In like manner, disobeying the process of the Court, interfering with or obstructing the officers of the Court in the lawful discharge of their duty, or commenting at public meetings, or in public prints, on proceedings pending in Court, amounts to contempt, for which the offender may be summarily dealt with and punished at discretion. Blackstone, in the fourth volume of his *Commentaries*, says: "Some of these contempts may arise in the face of the Court; as by rude and contumelious behaviour, by obstinacy, perverseness, or prevarication, by breach of the peace, or any wilful disturbance whatever. Others, in the absence of the party, as by disobeying or treating with disrespect the King's writ, or the rules or process of the Court, by perverting such writ or process to the purposes of private malice, extortion, or injustice; by speaking or writing contemptuously of the Court, or Judges acting in their judicial capacity; by printing false accounts (or even true ones, without proper permission) of causes then depending in judgment; and by anything, in short, that demonstrates a gross want of that regard and respect which when once courts of justice are deprived of, their authority (so necessary for the good order of the kingdom) is entirely lost among the people." So in *Onslow's and Whalley's* case (*L. R.*, ix. *Q. B.* 227), Lord Chief Justice Cockburn, delivering the unanimous opinion of the Court of Queen's Bench, said, "It is clear law that this Court has always held that comments made on a criminal trial, or other proceedings, when pending, is an offence against the administration of

justice, and a contempt of the authority of this Court. It can make no difference in principle whether those comments are made in writing or in speeches at public assemblies. Neither can it make any difference in principle whether they are made with reference to a trial actually commenced and going on, or with reference to a trial about to take place: we can have no hesitation in applying to the one the same rule which we should apply to the other; and we think, therefore, the counsel for the Crown have done no more than discharge their duty in bringing this case to our attention." Anything, therefore, which is calculated to bring the administration of justice into contempt may be taken notice of by summary process, and punished.

Authorities are not wanting to shew that Colonial Courts of Record possess the same power of committing and punishing for contempt. Thus, in *McDermott's* case (2 *L. R., P. C.*, 341), the Supreme Court of British Guiana committed McDermott for contempt for having written a scandalous article in *The Colonist* newspaper, reflecting on one of the Judges, and the administration of justice in the colony generally. He was imprisoned for six months, and, on appeal to the Privy Council, it was held that no appeal lay, and that the Court which committed for the contempt, and none other, was the proper tribunal to judge of that contempt. So in *Neethling's* case (*Buchanan's Rep.*, 1874), the Supreme Court of the Cape Colony adjudged the writer of a letter in the *Cape Argus* guilty of contempt.

Although no scandalous or improper reflection on the administration of justice can be allowed, everyone is undoubtedly at liberty to criticise the conduct of Judges on the Bench in a fair and legitimate manner. It is only when the bounds of moderation and of fair and legitimate criticism have been exceeded that the Court has power to interfere. I do not in the slightest degree desire to fetter free and open discussion in the public prints of the proceedings of this Court. The liberty of the press is a great privilege, and a great safeguard to the public; but the administration of justice is, in like manner, a matter of public importance. Consequently the law—the very protector of the liberty of the press—will not, on grounds of public policy, allow that liberty—its own creature—to be abused and employed as

1877
November 29.
December 18.

In re Phelan.

an instrument to bring the administration of justice into contempt. As far as I am personally concerned, I consider the paragraph in the *Goldfields Mercury* a foolish and absurd one; but I would be wanting in my duty, and in respect for the high office I hold, were I to let the publication, for which you are responsible, go unnoticed. I should very much have preferred that some Judge, other than myself, could have sat to try and dispose of the matter; but as the Court is at present only composed of one Judge, my having to decide in this instance is unavoidable. In itself, there is no objection to this course, for otherwise contempts would often go unpunished; and, moreover, in England it has frequently happened that a Judge of a Court of Equity, sitting alone, has been obliged to decide questions of contempt, although he was himself personally concerned.

With reference to the taxed Bill of Costs in *White* vs. *O'Leary*, it is desirable there should be no misunderstanding as to the ruling of the Court. The legal practitioners before the High Court may be divided into two classes. First, those who are *both* advocates *and* attorneys; and second, those who are attorneys merely. To the former class belong the Acting Attorney-General, and all the old practitioners, who under the former Government acted as advocates and attorneys. To the latter belong all those gentlemen, who, not having practised under the former Government, were admitted as attorneys merely, in terms of the Proclamation of 28th May last. Mr. Cooper, like the Acting Attorney-General, comes under the first class. In *White* vs. *O'Leary*, Mr. Cooper acted as *attorney* in the Court of Landdrost, and hence he could only be allowed his fees in accordance with the scale provided by law for the Landdrost Courts. The Acting Attorney-General, on the other hand, appeared as advocate in the High Court, only when the case came on for appeal, and was, therefore, like any other advocate, entitled to higher fees. As those practitioners, who are *both* advocates *and* attorneys, act in a two-fold capacity, the Court laid down the rule that, where such practitioners do work as attorneys, they are entitled to charge for work done as attorneys; and, where they do work as advocates, they are entitled to charge counsel's fees; provided, however, that no such practitioner shall be allowed to charge

a double fee for one and the same specific act—*e.g.*, for appearing as counsel in the High Court, a practitioner of class No. 1 can only charge counsel's fees; he cannot also make a separate charge for attendance in Court as attorney. This rule seems so intelligible that I am at a loss to conceive how there could have been any doubt on the point. It cannot be denied that the two-fold privilege enjoyed by the first class of practitioners gives them a great advantage over practitioners of the second class, and a change in this respect will soon have to be made, but this has nothing to do with the ruling of the Court as regards the bill of costs in *White* vs. *O'Leary*. I noticed that in one of the local papers the proceedings in that case were wrongly reported; and if people at a distance will accept what they read in newspapers as true and correct, and make improper comments thereon, they must take the consequences. It would be well if in the newspaper reports of the proceedings in Court greater accuracy were observed. For as these reports are circulated through the country and read by the people, it is absolutely necessary that they should be correct and accurate in every respect. An inaccurate report is obviously worse than no report at all; it is misleading to the practitioners at a distance; misleading to all the inferior tribunals throughout the country, and may be productive of much mischief.

Having adjudged you guilty of contempt—it remains to consider what punishment ought to be inflicted. I am glad to see that you regret what you have done, although I can not for a moment admit, as you have endeavoured to make out, that the words in your newspaper are capable of an innocent meaning. They either amount to a contempt, or are meaningless. But it cannot be supposed that when you wrote the paragraph in your newspaper you did not intend your words to be understood in their plain ordinary meaning. You have very fairly urged certain circumstances which the Court ought to take into consideration in fixing the punishment about to be inflicted. You have been put to considerable personal expense and inconvenience in coming down from Pilgrim's Rest, and I am therefore disposed to inflict a moderate penalty. Let it, however, be distinctly understood that, in future, the Court will exercise

1877
November 29.
December 18.
In re Phelan.

the power which it undoubtedly possesses, of punishing contempt with a stern and unsparing hand. The judgment of the Court is that you pay a fine of £10, and be imprisoned until the fine be paid; and further, that you pay the necessary costs of this motion.

BOSMAN *vs.* PRELLER AND DE VILLIERS.

Principal.—Agent.—Power to sue and defend.

An action is rightly brought against an agent, in his capacity as such, where the terms of the power granted him by an absent principal give authority to sue and defend, and to choose domicilium.

1877
December 6.
Bosman vs. Preller & De Villiers.

This was an appeal from the ruling of the Landdrost of Pretoria. The appellant, Bosman, sued Messrs. Preller & De Villiers, as agents of De Meillon, in the Court below, to have a certain provisional judgment made final.

Exceptions were taken by respondents:

1st. That the *domicilium* of De Meillon is not at the office of Preller & De Villiers, he being out of the jurisdiction.

2nd. That De Meillon, and not respondents, should have been sued personally.

These exceptions were upheld by the Landdrost.

The summons in the Court below was against "Johan Carl Preller and Tielman Nieuwhoudt de Villiers, in their capacity as duly authorised agents of Johannes de Meillon, lately of Pretoria, by virtue of a general power of attorney granted them by the said Johannes de Meillon.

Meintjes, for the appellant, relied on the terms of the power of attorney, and cited *Story on Agency*, § 58.

Preller, for the respondents, maintained that De Meillon, the principal, ought to have been personally sued. *Art.* 146 *Grondwet*, § 12 *Civiele Procedure*.

1877 December 6. Beeman vs. Preller & De Villiers.

The Court held that, regard being had to the terms of the power of attorney given by De Meillon to the respondents, expressly authorising them to sue and defend all causes, to choose *domicilium citandi et executandi &c.*, the appeal must be allowed, with costs. The Landdrost was thereupon ordered to go into the merits of the case, with leave to respondents to apply for extension of time to communicate with their principal, De Meillon.

In re PIETERSEN.

Lunatic.—Practice.

Meintjes, upon affidavits filed in this matter, moved for the appointment of a curator to the person of David Jacobus Pietersen, Snr., an alleged lunatic.

1877 December 15. In re Pietersen.

The Court held that it could not declare Pietersen lunatic upon affidavits, but only after hearing the evidence of medical men and other competent witnesses in open Court.

The application was thereupon withdrawn.

In re ROSELT AND INGLIS.

The Court will not question the validity of a title deed of property registered in the name of a minor, unless an action be brought to set aside such title deed or transfer.

A purchase on behalf of a minor will not be set aside, unless it appear that such would be for the benefit of the minor.

The Court will not sanction the dealing with landed property belonging to a minor, without previous judicial consent first had and obtained.

1877
December 27.

In re Roselt and Inglis.

The affidavit of J. J. F. Roselt set forth that he purchased a certain erf situated in the town of Potchefstroom, for, and in the name of, his minor son, a child of three years old, from one R. L. Daly for the sum of £200, payable in three instalments. The first two instalments were paid with money belonging to Mrs. Roselt, who was married by antenuptial contract to applicant. Finding that he was unable to pay the third instalment, applicant sold the said piece of ground to James Inglis, of Potchefstroom, for the sum of £250. Thereupon applicant paid off the third instalment to R. L. Daly, who cancelled a mortgage bond on the said erf for £200. It further appeared that transfer of the said piece of ground had been effected and registered to, and in the name of, the said minor, and that although the sale to Inglis was for £50 more than applicant had given for the erf, such excess was expended in necessary fees and charges, and did not benefit the minor in any way.

The affidavit of Inglis set forth that when he bought the piece of ground in question from applicant, acting for his minor son, he built a house thereon at a cost of £400, and that unless transfer of the ground be given him he would be the loser of £650.

De Vries, in support of the applicant that transfer should be ordered in favour of Inglis, argued that the transfer by applicant in favour of his minor son was invalid, as a father can not make a gift in favour of his minor children. *V. d. Linden,* p. 214, Henry's edition.

Preller, for Inglis, urged that he paid off the mortgage bond on the piece of ground, or erf, in question, and *bona fide* effected large improvements upon it. Unless the application were granted, he would be the sufferer to a considerable amount.

Ford (Acting Attorney-General) on behalf of the minor, submitted that it did not lie with applicant, who purchased

the erf for the benefit of his minor son, now to come to the Court and ask that such purchase might be set aside. The creditors of applicant might do so, but that was not the case before the Court. In answer to the argument of De Vries he would cite *V. d. Keessel, Th.* 485, and *Elliott's Trustees* vs. *Elliott,* 3 *Menz.* 86.

1877 December 27
In re Roselt and Inglis.

The Court held that while transfer of the erf stood registered in the Deeds Office in the name of the minor son of applicant, it could not now inquire into the validity of such transfer. A question of this kind must be tried in an action to set aside the transfer. Nor can an application be sustained to cancel a purchase on behalf of a minor unless it clearly appears that this will be for the benefit of the minor. The dealing with landed property belonging to minors will not be sanctioned without the previous consent of the Court. The application must therefore be dismissed.

Ex parte MUNICH.

A curator appointed to assist a minor in executing articles of service.

De Vries moved for the appointment of a curator to assist the minor, Hendrik Bosch, in entering into and executing articles of service as clerk to Attorney A. J. Munich, of Potchefstroom.

1878 January 15.
Ex parte Munich.

The Court ordered that Mr. G. H. Buskes be curator for the purpose of assisting the minor, and that the articles be entered into before the Landdrost of Potchefstroom.

MULLER *vs.* COPPEN.

Arrest of a debtor set aside where he had no immediate intention of leaving the jurisdiction.

1878
February 7.
Muller v Coppen.

The applicant, Muller, had been arrested by Coppen, acting manager of the Cape Commercial Bank, Pretoria. He was indebted in several amounts to the Bank, and had, for some time previous to the arrest, stated to one Van der Merwe that he contemplated leaving the town of Rustenburg for the Cape Colony. Muller had proceeded with his wife and family from Rustenburg to Potchefstroom, for the purpose, as the respondent alleged, of leaving the jurisdiction of the Court. The applicant, in his affidavit, admitted that he had contemplated leaving for the Cape Colony, but that he had abandoned his intention of so doing, and purposed starting business at Potchefstroom, where he had been promised support. He also annexed a receipt showing that he had paid one month's rent in advance of a house at Potchefstroom, which month had not yet expired. This was not denied by respondent.

De Vries argued that Muller had no present or immediate intention of leaving the jurisdiction. *Norden* vs. *Sutherland*, 3 *Menz.* 133.

Ford, contra, maintained that there was sufficient to show that applicant intended to leave the jurisdiction, and this was not met by the mere fact of his having hired a house for one month at Potchefstroom. *Roberts* vs. *Tucker*, 3 *Menz.* 130, *V. d. Linden* p. 430. The Court may at once, even now, give provisional sentence against applicant and confirm the arrest. *Standen* vs. *Clarke, Buch. Rep.* 1873, p. 27.

KOTZÉ, J., held there was no immediate intention of going beyond the jurisdiction on the part of the applicant, and ordered the arrest to be set aside with costs.

MULLER *vs.* VAN DER HEIDE.

A Landdrost has not by law jurisdiction to grant a writ of arrest against the person and goods of a debtor, where the debt amounts to £40, and is not proved by a liquid document or acknowledgment of debt.

1878 March 5. — Muller vs Van der Heide.

The Landdrost of Potchefstroom had, upon the application of Muller, granted an arrest against the person and property of Hendrik van der Heide for the sum of £40 with costs, alleged to be due by him to the applicant. The arrest was duly executed by the Messenger of the Landdrost's Court.

On review before the High Court,

Buskes with *Cooper* being for Muller, and

Munich for Van der Heide;

The Court held that, under § 55 of the Civil Procedure Act, 1874, the Landdrost can only grant an arrest against the person and property of a debtor for an amount within his jurisdiction, which, in illiquid cases, is £37 10s., except where the debt is proved by a liquid document or acknowledgment of debt, in which case his jurisdiction is £375. Arrest set aside with costs.

ZEILER *vs.* WEEBER.

Compulsory Sequestration.—Ancient Custom.

The right of creditors, under the Roman Dutch Law, to pray sequestration of their debtor's estate is not taken away by Art. 71 of the Volksraad Resolutions of 1852, which merely prohibits the voluntary surrender by a debtor of his estate.

By the Civil Law and the Roman Dutch Law, a general custom may abrogate a written law. Such custom must, however, be reasonable, ancient, and properly proved by acts and deeds.

1878
March 18.
" 18.
Zeiler vs Weeber.

This was an application for the compulsory sequestration of the estate of O. C. Weeber, a trader. The facts, and arguments of Counsel sufficiently appear from the judgment.

Cooper (with him *Buskes*) for applicant.

Ford (with him *De Vries*) for Murray, a judgment creditor.

Cur. adv. vult.

Postea (March 18.)

KOTZÉ, J., in delivering judgment, said:—This is an application for the sequestration of the estate of Oltman Charles Weeber, of Middelburg, trader. The petition of the applicant, Johan Frederick Christian Zeiler, states that Oltman Charles Weeber is indebted to him in the sum of £435, on an overdue and unpaid promissory note; and is further indebted to four other creditors, viz.: Marthinus J. Prinsloo, Ignatius Philip Ferreira, Samuel Veigt Oertel, and Petrus Christoffel Vercueil, in different sums, amounting in all to £560, besides the debt of £435 due to petitioner. The petition is accompanied by a proper verifying affidavit and the promissory notes and other documents, shewing the claims of the above creditors against the said Oltman Charles Weeber, and is also supported by an affidavit of Ignatius Philip Ferreira, one of the above creditors, who swears that Weeber is indebted to him in the sum of £138; and that the estate of the said Oltman Charles Weeber is hopelessly insolvent. The petitioner, therefore, for himself and the other creditors above-named, whose duly constituted agent he is, prays that the estate of the said Oltman Charles Weeber may be placed under sequestration by order of the Court. The application was opposed by one A. K. Murray, a creditor of O. C. Weeber, who, on the 1st day of February last, obtained a judgment in his favour, against the said Weeber, for the sum of £1,673 5s. 6d. As the application

involved a legal question of great importance to this country, the Court allowed counsel to appear for Murray and oppose the application. In the present case, I am clearly of opinion that Oltman Charles Weeber is wholly unable to pay his just debts, and is hopelessly insolvent. This appears not merely from the petition and affidavits in support thereof, but also from two judgments pronounced by this Court on the 1st February last against Weeber, one at the suit of P. J. Marais for £800, and the other at the suit of A. K. Murray for £1,673 5s. 3d.

The two main arguments relied on by counsel for Murray are—firstly, that the Legislature or Volksraad had, by resolution, always disapproved of anything like the introduction of an insolvent ordinance into this country; and, secondly, that it always had been the custom of the country that no estate should be placed under sequestration. In support of the first argument, counsel referred to Art. 71 of the Resolutions of the Volksraad of the 15th June, 1852; the address of President Burgers to the Volksraad on the 24th February, 1873; Resolution of Volksraad 27th February, 1873; Report of Committee to Volksraad October 30th, 1874; and Resolution of Volksraad thereon. It will be more convenient to consider, first of all, the proceedings which took place in the Volksraad during the years 1873 and 1874, with reference to the introduction of an Insolvent Law or Ordinance into this territory. In his address to the Volksraad on the 24th February, 1873 (*vide Gazette*, 4th March, 1873), the President intimated that a Draft Insolvent Ordinance would be laid before the Volksraad, similar to the Ordinance in force in the Cape Colony, and which is generally known as the Insolvent Ordinance. On reference to the Draft Ordinance, I find that it is based upon the Ordinance No. 6, of 1843, which is the Insolvent Law at present existing in the Cape Colony. After some discussion this Draft Ordinance was, on the 27th February, referred by the Volksraad to a Committee of six members for consideration and report at the next session (*vide Gazette* of 4th March, 1873). On the 15th October, 1874, before proceeding to the discussion of the introduction of an Insolvent Ordinance, the Volksraad resolved that the Committee should first make their report, and on the 30th

1878
March 13.
" 18.
Keller vs Weeber.

Octobe . 1874 (*Gazette*, November 18, 1874), the Committee reporte s follows:—"That inasmuch as it is necessary that a prov n of law should provide in a clear manner for the distrib and payment of the debts of persons, who are unable y to pay them, and should regulate the rights and cl f creditors and debtors in such a way that both may b ected against oppression and fraud, the Committee . is reason recommend to the Hon. the Volksraad the pr of such a law, but they cannot recommend the adopti he law as at present submitted to them, viz., the D dinance regulating the distribution of insolvent estate he South African Republic, by reason of its being prolix, ambiguous, obscure, and therefore unintelli ; and hence the Committee recommend the Hon. Volks refer the proposed law back to the Government for th se of shortening the same and making it more intelli so that it may more easily comply with the afore- object, and particularly to make alterations in the ing sections. . . . . And publish said altera the *Gazette*."

T ort was adopted by the Volksraad, with a recomm n to the Government to have it published in the *G* Nothing, however, has since been done in the matte s important here to observe—first, that the Comm whose report was adopted, so far from discounte or rejecting the introduction of an Insolvent Ordin Law, distinctly recommended to the Legislature t nition of the principle of a proper Insolvent Law, h they could not at the same time recommend the ad f the particular Draft Ordinance submitted to them, ground of its provisions being framed in langu bscure and unintelligible. Secondly, that the Resol the Volksraad of 1873 and 1874 relate solely to the ction of an Insolvent Ordinance like that in force i ape Colony since the year 1843.

I as appears from the supplement or *Bylage* to the *Gr* , Art. 1, the Volksraad resolved that the manual, or tex f *Van der Linden*, in so far as it did not conflict w *Grondwet*, or other laws or resolutions of Volks uld be the law of the land. Now, *Van der Linden*, B , part 1, chap. 10, lays it down that if a debtor

is insolvent, the Court may sequestrate his estate either upon the application of a creditor or of the debtor himself. The Resolutions of the Volksraad of 1873 and 1874 do not in the slightest degree affect this doctrine as stated by *Van der Linden*. They have reference solely and entirely to the introduction of an ordinance at that time before the Legislature, which affected to deal with the question of insolvency in its entirety, and sought to provide for many matters and things connected with the question of insolvency for which the common law makes no provision. It remains now to consider the Resolution of the Volksraad of 15th June, 1852. On that day, as appears from the written records, Art. 71, the Volksraad, sitting at Potchefstroom, resolved as follows:—"*That in our community it shall not be allowed anyone to surrender his estate as insolvent, but proceedings must be taken according to the nature of the case.*"

Unfortunately the records of what passed in the Legislature, in the early days of the Republic, are preserved in writing only, and there is nothing to show what induced the Volksraad to pass this resolution. A careful examination of the preceding Articles, viz., Art. 65, *et seq.*, shews that a memorial was presented by Landdrost Smit, asking for a better regulation with reference to the estates or properties of minors and widows. The Raad thereupon appointed Orphan Masters, and further considered and discussed the matter of testate and intestate estates, and the different duties of the Orphan Masters. As the Volksraad was considering the question of estates, it is reasonable to suppose that insolvent estates were also discussed, and hence the resolution mentioned in Art. 71 of 1852. Whatever may have been the reason which induced the Legislature to frame and pass that resolution, it seems to me quite clear that the meaning of the resolution is this, that no debtor could make a voluntary surrender of his estate, (probably to prevent anything like fraud on his part), but that the ordinary common law remedy of the creditor should remain untouched. If the law, as laid down in *Van der Linden*, has no application, it can only be on account of this resolution of 1852; but as this resolution does not deprive a creditor of his right of praying the Court to sequestrate a debtor's estate, I am bound by Art. I. of the *Bylage* to the *Grondwet* to give

1879
March 18.
to
18.
Beller vs Weeber.

effect to the law as stated by *Van der Linden*, and to grant the sequestration prayed for.

The other argument advanced against this application is, that even if Art. 71 of 1852 does not apply, the provisions with reference to sequestration, as stated in *Van der Linden*, have never been acted upon, for it always has been the invariable custom in this territory not to sequestrate the estate of any debtor, and hence the doctrine as laid down by the above authority cannot now be enforced as law. In support of this argument reference was made to *Van der Linden*, Book I., chapt. I., § 7, and the *Aanhangsel tot het Rechtsgeleerde Woordenbook in verb. abrogatio Legis.*

I must state that previous to the present application and the opportunity which it has afforded me of perusing the written resolutions of the Volksraad of 1852, I was under the impression that the law of this country did not permit anything like the sequestration of a debtor's estate. This impression was caused by representations made to me to the effect that the Volksraad had so ordained; but I am glad to find that this impression has been erroneous. As much stress has been laid upon the argument that by custom and practice the doctrine of *Van der Linden* has been abrogated, it will be advisable to go somewhat fully into the question. According to the Roman Law and the Law of Holland, general customs could abrogate a written law; *Dig.* I., tit. 3, lex. 32, § 1; *Glück Pandekten*, vol. 1, § 93; *Van der Linden*, book I., chapt. 1, § 7. But in order that a custom may abrogate a written law, it must (1st) be reasonable, (2nd) it must be ancient, for although in Dutch and Roman Law there is no fixed period from which the time of legal memory runs; still a custom to be good must be immemorial, or, at any rate, of ancient date. This appears from the expressions, *Longa consuetudo; inveterata consuetudo; vetus usus; mores majorum; diuturni mores*, and the like; and, (3rd), there must be clear and satisfactory proof of the custom by acts or conduct, *Van der Linden, ub. sup.*, lex. 32, § 1, *Dig.* I., tit. 3; *Aanhangsel tot R. W. Boek in verb. abrogatio legis.*

Those customs were said to be unreasonable, *quæ nullam utilitatem habent atque tamen incommodo homines efficiunt*, *Van der Linden supplementum ad Voet l'and.*, lib. I., tit. 3, n.

28, and as such had no effect whatever. Now nothing could be more unreasonable, than a custom which would prevent one or more creditors from exercising the right of having their debtor's estate placed under sequestration, for the benefit of all the creditors generally. Such a custom would have a serious effect upon the country at large, and its trade and commerce; and may even sometimes promote fraud. The alleged custom, moreover, if it exists at all, is of such recent origin that I do not think the Court would be justified in recognising its validity. But more than this, there is absolutely no proof whatever of the existence of the custom. Whenever it is alleged that a custom contrary to a written law exists, it is incumbent to show clearly and unmistakably that such custom has always been uniformly observed and adhered to. This appears from *Voet ad Pand.* I., tit. 3, n. 29, and the authorities which have already been cited, and the authority in the *Aanhangsel tot het Rechtsgeleerde Woordenboek*, so much relied on by counsel for Murray, lays down the very same doctrine, *e.g.*, "Those, who say that a certain law which has once been adopted has been abrogated, must clearly prove the assertion, as it were *in facto* or by some act. . . . . But this I hold to be beyond doubt, that a law, which has never been received or observed in practice, is not of the slightest force, if after its publication a long time has elapsed, and the people have always acted against the provisions of that law, and adhered to a former usage or law; for although, as has been stated, no law can by this alone, viz., that it is not in use, be abrogated, still, if there exist numerous acts or deeds which have been admitted contrary to the disposition of the law and which the legislature has not disapproved, it is clear that the law had no effect from the very first; or at least was abolished after the observance *ex post facto* of a usage to the contrary." There must, therefore, be proof of the custom by acts and deeds, or in the words of the Roman law *rebus ipsis et factis*, *Dig.* I., 3, 32, § 1. Not a single judgment of a court of law in this country, deciding that there could not be any sequestration of a debtor's estate, was cited. The only attempt at proof of the custom was an assertion by counsel that there never had been any instance of the sequestration of a debtor's estate in this territory. And certain affidavits

1878
March 13.
" 16.
Keller vs Weeber.

by the Landdrost of Pretoria, and several members of the Volksraad, were handed in to show that these gentlemen always had been, and still are, of opinion and under the belief that no person could be declared insolvent whether at his own request or upon petition by his creditors; nor could his estate be placed under sequestration. No weight can be attached to this individual opinion of a few members of the Legislature and of the Landdrost of Pretoria. The mere fact that they believed that such was the law is no proof in favour of the custom, and so far from stating anything with reference to the custom, on which it has been attempted to rely, those gentlemen, with the exception of the Landdrost, base their opinion upon the resolutions of the Legislature of 1852 and 1873-74, and not upon the existence of any custom at all. On the other hand, there are instances of sequestration of a debtor's estate in this country. Thus: the estate of John H. M. Struben, trader, was placed under sequestration, and curators appointed, in 1866 (*vide Gazette* 27th March, 1866). Whether this sequestration was made upon application by the debtor, or one or more of his creditors, does not appear. But in the same year, 1866, the estate of Tinley and Peebles, traders, was, by the then Landdrost of Pretoria, compulsorily sequestrated upon the petition of the curators in the sequestrated estate of Struben, (*Gazette* 24th April and 15th May, 1866). This case of Tinley and Peebles is precisely similar to the present application. The question of the existence of the custom, which it has been attempted to set up, is therefore effectually disposed of. Not merely is there no satisfactory proof of the existence of the custom; the case of Tinley and Peebles, on the other hand, proves that no such custom exists.

The result, at which I have arrived, is, that by the law of this country the Court has power to sequestrate the estate of a debtor, upon petition of one or more of his creditors, and that it is the duty of the Court to exercise that power, where it is satisfied of the justness of the creditor's claim, and the total inability of the debtor to pay or satisfy that claim.

The estate of Oltman Charles Weeber must accordingly be sequestrated, and placed under curators.

The application is, therefore, granted with costs as against Murray.

PERRIN *vs.* TURTON.

Foreign Sequestration.—Action by Insolvent.—Sale and Pledge by Depositary.

The Court will give effect to a foreign assignment in bankruptcy or sequestration of a debtor's estate, in so far as the personal property of such bankrupt or debtor is concerned.

A plea of no property in the plaintiff means no property as against the defendant. The foreign sequestration, therefore, of plaintiff's estate at the Diamond Fields, although it vests his personal property in this territory in his trustee, does not prevent the plaintiff from bringing an action against defendant for recovery of certain quicksilver, or its value.

The mere possession of property belonging to another, without any authority to deal with the property otherwise than for the purpose of safe custody, will not, if the person so in possession takes upon himself to sell, or pledge, it to a third party, divest the owner of his rights as against the third party, however innocent in the transaction the latter may have been.

1878
March 22.
" 28.
" 29.
" 29.
April 4.

Perrin vs Turton.

Action for the recovery of certain three jugs of quicksilver, or their value.

The defendant took exception to the summons, that plaintiff is an unrehabilitated insolvent, and as such is not competent to institute this action in his own name and for his own benefit. He then pleaded the general issue, and, further, a special plea that the quicksilver had been pledged to him by one Guillaume, the authorised agent of plaintiff.

Evidence was then led, and a number of letters put in. The facts sufficiently appear from the judgment below.

Hollard (with him *De Vries*), for the plaintiff, argued that upon the evidence it was clear Guillaume had no

1878
March 22.
" 28.
" 29.
" 30.
April 4.

Perrin vs Turton.

authority to pledge or sell the quicksilver to defendant, who, moreover, had sufficient information to place him on his guard against advancing money to Guillaume on the quicksilver.

Cooper (with him *Buskes*), for the defendant, maintained that Guillaume represented the mining interests of Perrin, and had paid stand licenses on his behalf. Guillaume could not protect these interests without money, and had pledged the quicksilver for that purpose. As agent of Perrin, he had authority to do so.

Cur. adv. vult.

Postea (April 4).

Korzé, J., in giving judgment, said: This is an action for the recovery of 210 lbs. of quicksilver, the property of the plaintiff, or its value, from defendant. The quicksilver was, in May, 1876, left in the possession of one Samuel Guillaume, at Pilgrim's Rest Goldfields, by Paul Perrin, the brother and agent of plaintiff at the time, for the purpose of safe custody. On the 23rd October, 1876, Guillaume obtained from the Cape Commercial Bank, at Pilgrim's Rest, of which defendant was manager, an advance of £75. For this Guillaume gave his promissory note for £78 3s. 3d., payable four months after date, and handed over to the defendant, as security for the repayment of the loan, the quicksilver which had been left in his custody by the plaintiff's brother. The defendant, before pleading to the summons, raised the following exception, viz.: That the plaintiff's estate had, in May, 1873, been placed under sequestration at the Diamond Fields, in the territory of Griqualand West, and that he was still an uncertificated and unrehabilitated insolvent, and accordingly could not bring this action against defendant.

In support of this exception, defendant relied on §§ 403 and 409 of *Story's Conflict of Laws*, to show that this Court will recognise and give effect to the foreign assignment or sequestration of plaintiff's estate; that such sequestration divested the plaintiff of all his personal property, even in this territory, and vested it in his trustee, or the Master of

1878
March 22.
" 28.
" 29.
April 4.

Perrin vs Turton.

the High Court at the Diamond Fields. Now, it is quite clear that, in the absence of any local law to the contrary, this Court will, as was contended for by defendant's counsel, give effect to a foreign assignment in bankruptcy or sequestration of a debtor's estate, in so far as the personal property of such bankrupt or debtor is concerned. This is a well-settled rule of general jurisprudence. Not merely is it in accordance with the doctrine as laid down by the publicists and commentators on the Civil Law, it is recognised by the Courts of almost every civilised country. "Personal property," says Lord Loughborough, "being governed by the law of the country, which governs the person of the owner, the condition of a bankrupt, by the law of England, is, that the law, upon the act of bankruptcy being committed, vests his property upon a just consideration, not as a penalty, and takes the administration of it by vesting it in assignees, who apply that property to the just purpose of the equal payment of his debts. If the bankrupt happens to have property which lies out of the jurisdiction of the law of England, if the country in which it lies proceeds according to the principle of well-regulated justice, there is no doubt but that it will give effect to the title of the assignees." (*Still* vs. *Wornick*, 1, H. Bl.) So, in a case before the Court of Session in Scotland, it was stated from the Bench that the interests of commerce, as well as the regard which all nations ought to pay to the principles of general law, point out the necessity of adopting, in cases of bankruptcy, one uniform rule, and nothing can be more expedient than that we should follow out the principle already noticed, of movable effects being subject to the disposition of that law, which binds the person of their owner. It is perfectly fair and equal that when an English merchant, who happens to have personal effects here, becomes bankrupt, the law of his own country should be allowed to take his whole effects, wherever situate, into its custody, for the purpose of equal distribution among his creditors, according to the rules of the English law, while we are permitted in the case of a Scotch bankruptcy to do exactly the same thing in England. The amount of the whole is that, by the commission of bankruptcy and legal assignment, the property of the personal effects becomes changed,

1878
March 22.
" 28.
" 29.
" 30.
April 4.

Perrin vs Turton.

and the bankrupt completely divested by a transfer, which in this country we ought to receive as complete, and give it the same effect as we do to our own bankrupt law, or as they give in England to our present law. (*Strothers* vs. *Read*). So in one of the earliest cases on the subject, which came before the Courts in England, the Court of Chancery gave effect to the bankrupt laws of Holland. *Burge Com.* Vol. III., p.p. 904, 919, *Story's Conflict of Laws*, §§ 403, 9.

It is clear, therefore, that the sequestration of the plaintiff's estate at the Diamond Fields affects his personal property in this territory, and vests it in his trustee. Consequently the trustee can recover such property in this Court, and his claim would be preferred against local creditors here, unless they possess a specific lien on the property, acquired before the sequestration. I have gone into this question, not so much on the ground that it directly affects the present case, but because it has been raised by the exception which the defendant has placed on the record, and is portion of the law of sequestration which, as was decided by this Court in the recent case of Zeiler *vs.* Weeber's Estate, *ante*, p. 17, prevails in this country.

It now remains for me to say whether the exception taken by defendant is a bar to the action, and I am clearly of opinion that it is not. The foreign sequestration of the plaintiff's estate at the Diamond Fields vests his personal property in this territory in his trustee; but this will not deprive the plaintiff of his right to bring the present action for the recovery of the quicksilver, or its value, from defendant. The question is not whether the plaintiff's trustee is entitled to the property, or whether some person other than the plaintiff has a better title to it. The plea of no property in the plaintiff, means no property as against the defendant. Perrin, at the time of the delivery of the quicksilver, was, through Guillaume, in lawful possession thereof *quoad* the defendant. It was upon this very supposition that defendant advanced the money, for he believed Guillaume had authority from plaintiff to pledge the quicksilver. It is not now for Turton to set up the plea that some third party has a better title than the plaintiff to the quicksilver, for this has nothing to do with the present case. The quicksilver was

acquired by defendant after sequestration. The simple question is—as between plaintiff and defendant—has the plaintiff such a right of property in the quicksilver as to maintain this action as against defendant? I am clearly of opinion that he has (*Herbert* vs. *Sayer*, 5, Q.B. 965). The exception must therefore be overruled.

The defence to the action is twofold, viz.: first, that Guillaume, in pledging the quicksilver, had implied authority from plaintiff so to do, and that, therefore, the plaintiff was bound by the act of his agent; and secondly, that, even if the property in the quicksilver was still in plaintiff, he could not recover the same from defendant, unless he first satisfied and paid the promissory note.

I may say at once that no authority was cited in support of this second proposition, and that it is clearly untenable. With reference to the first argument, I, at one time, during the progress of the case, had some difficulty in coming to a satisfactory conclusion as to whether the plaintiff, by his conduct and dealings with Guillaume, had so acted as to lead the defendant to believe that Guillaume had apparently authority for raising money on plaintiff's behalf, and pledging his property as security for repayment of the money advanced. The evidence of the defendant himself has, however, entirely removed all doubts from my mind. This is what Mr. Turton himself says:—"Guillaume told me he wanted money to pay debts already incurred. He did not say what for. He said Mr. Perrin had not sent him up any money. I asked him for his power of attorney. He said he had not got one, but he could shew me sufficient to satisfy me he had authority to borrow the money. He went for his correspondence with the two Perrins. He brought it to me, and that correspondence satisfied me he had power to borrow the money. The letters were partly in French and partly in English. I can read French sufficiently well to satisfy me Guillaume was speaking the truth." After this statement from the defendant, it is wholly unnecessary to go into the evidence, *dehors* the letters, which have been relied on by defendant in support of the argument that Guillaume had implied authority from plaintiff to raise money and pledge his property as security. Defendant at first doubted whether

1878
March 22.
" 28.
" 29.
" 30.
April 4.

Perrin vs Turton.

Guillaume had this authority, and it was only after the production of the letters from plaintiff, and plaintiff's brother and agent, to Guillaume, that he consented to advance the money. The only question, therefore, is whether the letters mentioned by defendant gave Guillaume this authority? I have gone carefully over the correspondence between the Perrins and Guillaume, and can find nothing to warrant the conclusion at which defendant arrived, viz., that Guillaume had authority to raise money on plaintiff's behalf and pledge his property as security for the loan. The letters shew that plaintiff had engaged Guillaume to obtain a grant from the Gold Commissioner, and that it was plaintiff's intention to make experiments with quicksilver on the mud of the creek at Pilgrim's Rest with the view of obtaining gold. Guillaume was to collect as much mud as he could, and if the plan succeeded was to have one-third share of the profits. Guillaume was also authorised to engage some Kafirs for the purpose of digging and collecting the mud. Plaintiff from time to time, by letter, remitted sums of money to Guillaume, and when his brother, Paul Perrin, arrived at the Goldfields, he—holding the plaintiff's power of attorney—paid Guillaume's private debts. The plaintiff also had a stand at Pilgrim's Rest with a house on it, and certain tools, quicksilver, and other property in it. Paul Perrin did not remain long at the Goldfields, and when he left he placed Guillaume in possession of the house and the property in it. Guillaume had permission to live in the house free of charge, on condition of his taking care of the plaintiff's property. In May, 1876, Paul Perrin, the duly authorised agent of plaintiff, wrote to Guillaume stating that his brother—the plaintiff—did not intend returning to the Goldfields, and that he was willing to hand over all his property, grants, and house, for the sum named in an inventory left by Paul Perrin with Guillaume on his departure from Pilgrim's Rest. The sum named was £968 8s. 6d. Another letter from Paul Perrin to Guillaume informed Guillaume that enclosed he would find a letter from plaintiff "giving you full power." This full power evidently referred to a power given to Guillaume to keep the property of plaintiff at the Goldfields for the sum of £968 8s. 6d., as appears from the letter of the 24th May, 1876, from Paul Perrin to Guillaume.

Guillaume wrote back to say that it was impossible to sell or dispose of the property for the price fixed by the inventory. On the 4th October, 1876, plaintiff himself writes to Guillaume informing him that his brother has stopped payment at Port Elizabeth, and he (plaintiff) has to remain there to represent the interest of his father in Paul Perrin's estate; and then the letter goes on as follows:—"Leave everything in the most complete *statu quo*, and do not make any outlay until my return. You can dwell in my house gratis and take care of it, in endeavouring to earn a living, as I must do it here myself." This letter was received by Guillaume on the 22nd October, 1876, the day previous to the effecting of the loan of £75, and the pledging of the quicksilver to the defendant. The letter, in my opinion, so far from giving Guillaume any authority to raise money on plaintiff's behalf, and pledging his property, should have placed defendant on his guard, and he ought to have refused Guillaume's application for the loan.

The plaintiff's case, therefore, rests upon the general principle of law that the mere possession of the property of another without any authority to deal with the property otherwise than for the purpose of safe custody, as is the case here, will not, if the person so in possession takes upon himself to sell, or pledge, to a third party, divest the owner of his rights as against the third party, however innocent in the transaction the latter may have been. (*Johnson* vs. *Credit. Lyonnais Company, L.R., Q.B.D.* 3, p. 36).

There must, therefore, be judgment for the plaintiff for £100, the value of the quicksilver, with costs.

THE QUEEN *vs.* SAUL, ROOIKRAAL, AND SAUL.

Murder.—Prisoners' Statements.

The statements of prisoners, who had been duly cautioned, as required by law, received in evidence against them, where such statements were made after committal by the Landdrost on a charge of murder.

1878 March 28.

Reg. vs Saul, Rooikraal, and Saul.

A preliminary examination had been held by the Landdrost of Rustenburg on the 26th December, 1877, and 12th January, 1878, when the prisoners were duly committed for trial. Thereafter, on the 2nd February, the Landdrost took down the prisoners' statements, which they voluntarily made after having been cautioned in the usual way. The prisoners were indicted for murder, and the Attorney-General having led evidence for the Crown before the jury, proposed to put in the prisoners' statements.

Nyhoff, for the prisoners, objected against their statements being put in, on the ground that these statements were taken down by the Landdrost after the preliminary examination had been closed and the prisoners committed for trial.

Jorissen (Attorney-General), for the Crown, contended that a prisoner could at any time make a statement, which could be received in evidence against him. The prisoners had been cautioned in the way required by law. The provisions of § 52 *Criminal Procedure*, 1864, had been complied with.

Nyhoff, in reply, cited *Roscoe*, p. 28, (8th ed.)

The Court ruled that there was nothing to shew that when the prisoners made their statements before the Landdrost, any hope of favour or pardon, nor any threat of punishment, was held out to them. On the contrary, the prisoners were duly cautioned as required by law. The prisoners could at any time make a statement, or confession,

even after they had been committed for trial. The objection must, therefore, be overruled, and the prisoners' statements received in evidence against them.

1878 March 28.
The Queen vs. Saul, Kooikraal, and Saul.

LOXTON *vs.* BRAYHIRST.

Cancellation of Lease.

The lease of a house cancelled, where the tenant had not observed the conditions of the lease, and where, moreover, the lessor had immediate need of the house for himself and family.

Loxton, the plaintiff, had leased a house and erf at Utrecht to Brayhirst, for the period of five years. It was stipulated in the deed of lease that Brayhirst should not sell liquor in smaller quantities than by the bottle, nor allow it to be drunk on the premises. Further, that he should keep the premises in thorough repair during the continuance of the lease. Evidence was led to shew that defendant had not kept the premises in proper repair, and had sold liquor by the glass. On account of the disturbed and unsettled state of the Zulu Border, plaintiff was obliged to leave his farm with his family for the town of Utrecht, and had immediate need of the house leased.

1878 April 5. " 6.
Loxton vs Brayhirst.

De Vries for plaintiff.

Preller for defendant.

KOTZÉ, J., in delivering judgment, held that the defendant had broken the conditions mentioned in the lease. It also appeared from the evidence that the plaintiff had need of the house for himself and family. The principle that a lessor can depart from his own contract, which he has entered into voluntarily, and under which the lease was to continue for five years, seemed a strange doctrine. The great weight of authority, however, shews that a lessor has

1878
April 5.
" 6.
Loxton vs Brayhirst.

the right to have a contract of lease set aside, where he has absolute need of the premises leased. The only authority against this right of the lessor is *Van der Keessel, Th.* 675.

The lease was accordingly ordered to be cancelled.

TRUTER *vs.* TRUTER

Divorce.

A fresh summons praying for a divorce a vinculo *is not necessary, where, in the summons for a decree of restitution of conjugal rights, it is stated that on non-compliance with the order to return to cohabitation, application will be made for a decree* a vinculo.

1878
April 4.
" 9.
Truter vs Truter.

Summons by a wife against her husband for restitution of conjugal rights and praying the Court to direct "that Jan George Truter shall forthwith return to cohabit with the said plaintiff, failing which, application will be made to this honourable Court on the part of the said Maria Katrina Truter for dissolution of the bonds of marriage *a vinculo matrimonii*. After hearing evidence, the Court, on 1st February, granted a decree for restitution of conjugal rights; the decree to be published for one month in the *Gazette* of the Transvaal and also in the Free State, to which State the defendant had proceeded from Potchefstroom.

De Vries, for the plaintiff, now put in the *Government Gazette* of 12th, 19th, and 26th February, and the *Express* newspaper of Bloemfontein, in which the decree of the Court ordering defendant to return to cohabitation with his wife, was published, and applied for a decree of divorce *a vinculo*, as prayed in the summons, upon the evidence of malicious desertion already taken by the Court.

Cur. adv. vult.

Postea (February 9).

1878
April 4.
" 9.
Truter vs Truter.

KOTZÉ J.: This case stood over for the purpose of considering whether the Court could grant a divorce *a vinculo* as prayed at once, or whether a fresh summons for divorce *a vinculo* is necessary. In *Mackay* vs. *Mackay*, 1 *Menz.* 256, it seems a fresh summons was taken out after non-compliance by defendant with the order of the Court ordering her to return to cohabitation. In the present instance the summons prays for a decree ordering the defendant to return to cohabitation, and states that on non-compliance with such order application will be made for a divorce *a vinculo*. There must be a decree for a divorce *a vinculo matrimonii*.*

ZEILER *vs.* ROSSEAU.

Sale of a farm in execution.—Ejectment.

Where the plaintiff had at an execution sale bought a farm, belonging to the defendant, and had obtained transfer thereof: Held, that he could not succeed in an action of ejectment against the defendant, because of an irregularity in the writ under which the farm was sold in execution, and because there was no prior attachment of the moveable property of the defendant, nor any return of nulla bona.

1878
April 9.
" 11.
Zeiler vs Rosseau.

The plaintiff brought an action of ejectment against the defendant, prayidg the Court to order him to leave the farm Olifantsvley, in the district of Heidelberg.

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* But in a subsequent case, *Erasmus* vs. *Erasmus*, 7th November, 1878, the Court, under similar circumstances, refused to grant a divorce *a vinculo* on application, and directed a fresh summons for divorce to be taken out. The Court, at the same time, intimated that, where the plaintiff was desirous of obtaining a divorce *a vinculo*, on the ground of malicious desertion, it was advisable at once to institute an action in that form, and not for restitution of conjugal rights. Although the Court would in such a case, on proof of desertion, first order the defendant to return to cohabitation before granting a divorce, still in this way the necessity of a second summons would be obviated. This course has since been followed in practice.—ED.

1878
April 9.
" 11.
Zeiler vs Rosseau.

Plaintiff purchased the farm Olifantsvlei at an execution sale, and transfer was passed and registered in his name.

The defendant pleaded that the sale in execution and the consequent transfer in favour of plaintiff were illegal, upon the ground—1st. That the writ, directed to the Sheriff of Heidelberg, to attach the property of the defendant, in satisfaction of the judgment of the Landdrost Court against him, in the case of *Durham* vs. *Rosseau*, sets forth that the Sheriff is to attach the moveable and immoveable property of defendant to satisfy the claim and judgment in favour of *the Government of the South African Republic*; whereas the Local Government never was a party to the suit of *Durham* vs. *Rosseau*.

2nd. That it is not for a judgment creditor to attach the immoveable property of the defendant, until the moveable property has first been attached and proved to be insufficient to satisfy the judgment, or until it is shewn that there exists no moveable property of the debtor to satisfy the writ.

From the evidence it appeared that on 26th March, 1877, the Landdrost of Heidelberg gave judgment in the case of *Durham* vs. *Rosseau* for £125 with costs. To satisfy this judgment a writ was taken out by plaintiff and handed to the Sheriff of Heidelberg, by which that officer was directed to attach the moveable property, and, if need be, the immoveable property of the defendant, to satisfy the judgment of the Court in favour of *the Government of the South African Republic*. The heading of the writ was, however, *in re Durham* vs. *Rosseau*. The Sheriff executed this writ, and made a return to the effect that he repaired to the farm Olifantsvlei and the homestead of the defendant, who was absent from home, and found the house shut; finding no one to point out to him any moveable property, he attached the immoveable property of the defendant. The farm Olifantsvlei was thereafter advertised for sale in the *Gazette* under the heading of "Sheriff's sale in satisfaction of the judgment of the Landdrost Court in the case of *Durham* vs. *Rosseau*." At the sale the plaintiff became the purchaser, and obtained transfer of the farm Olifantsvlei.

Meintjes, with *Cooper*, for the plaintiff.

De Vries for the defendant.

1878
April 9.
" 11.
Zeiler vs Ross
sean.

Cur. adv. vult.

Postea (April 11).

KOTZÉ, J.: I am of opinion that the sale in execution of the farm Olifantsvlei was invalid, for both the reasons urged by the defendant. The moveable property must first be attached and sold before the immoveable property can be taken in execution. The return made by the Sheriff is not a return of *nulla bona* so far as the moveables are concerned. He merely says there was no one to point out any moveable property to him. He does not say there were no moveables. It is only where immoveable property has by the judgment of a competent court been declared executable, that it is unnecessary first to attach the moveable property of a judgment debtor. *(Van der Linden, Jud. practijck* II., p. 91). There must, therefore, be judgment in favour of the defendant. As, however, the sale of the farm was advertised in the *Gazette,* and consequently the plaintiff bought, believing that the proceedings were quite regular, there will be no order as to costs.

ROSS AND VAN ZYL *vs.* WOLMARANS.

Land Commission.—Appeal.—Diagram of certain land ordered to be framed.

1878
April 25.
Ross & Van Zyl
vs Wolmerans.

The Land Commission for the District of Pretoria had given judgment in the above case, after taking evidence and personally examining the beacons and boundaries of the ground in dispute between the parties. On appeal to the High Court from the decision of the Land Commission, the Court, finding it extremely difficult, if not impossible, to arrive at a conclusion upon the evidence without the aid of a proper diagram framed by a surveyor, ordered that a

1878 April 25.

Ross & Van Zyl vs Wolmerans.

surveyor should survey the ground and frame a diagram, marking down only the beacons mentioned by the different witnesses in the Court below, such diagram to be filed of record in the case in appeal.

Ex parte LITHAUER.

Criminal Arrest.—Countersigning of Warrant.

The arrest of applicant under a criminal warrant, issued by a Magistrate in Griqualand West, and countersigned by the Attorney-General of the Transvaal, set aside as being contrary to the provisions of Ordinance No. 5 of 1871.

1878 April 25.

Ex parte Lithauer.

Application for the discharge from arrest of Isaac J. Lithauer, and the cancellation of a certain bailbond entered into by him under the following circumstances:—Applicant was arrested in Pretoria under a warrant issued and signed by Robert Irwin Scholtz, Resident Magistrate of Kimberley, Griqualand West, on reasonable grounds of suspicion that the said applicant had committed the crimes of fraud and perjury. This warrant was conntersigned by E. J. P. Jorissen, Attorney-General of the Transvaal. Lithauer, having thereupon been arrested, executed a bailbond in the ordinary form.

Cooper for the applicant.

Jorissen (Attorney-General) in support of the arrest.

The Court held that the warrant having been issued by Mr. Scholtz in the territory of Griqualand West, and the applicant being within the territory of the Transvaal, two requisites must concur in order to support the arrest, viz., an application by the Government of Griqualand West to the local Government of the Transvaal for the delivery up of applicant, and, secondly, the existence of an extradition treaty between Griqualand West and the Transvaal. Both the requisites are necessary under Ordinance No. 5 of 1871,

1878.
April 25.
Ex parte Lithauer.

which, until altered by competent legislative authority (as provided in the Annexation Proclamation of 12th April, 1877), is the law of the land. Both requisites failing in the present instance, the arrest must be set aside, and the bail-bond executed by the applicant cancelled.

VAN WYK AND OTHERS *vs.* KRIGE.

Advocate and Attorney.—Suspension from practice.

An advocate and attorney, who had been employed by his client to pass transfer of certain farms, and had received £11 14s., the amount of necessary charges for the purpose, kept back his client's money for more than two years, without expending it for the purpose intended, or passing transfer as instructed. Held that this was an act of professional misconduct which the Court could not overlook, and the respondent was accordingly suspended from practice for the period of twelve months.

Circumstances which will induce the Court to refuse admission to an applicant as attorney will also, as a general rule, justify the Court in dealing summarily with an attorney already admitted.

Where, upon the affidavits, the Court cannot arrive at a definite conclusion beyond reasonable doubt, it will not interfere summarily until a conviction against the attorney has first taken place. Secus, *where the charges are admitted by the attorney, or where they are established beyond reasonable doubt.*

1878
June 25.
July 4.
Van Wyk and others vs Krige.

A rule *nisi* had been applied for and granted against W. A. Krige, an advocate and attorney of the Court, to show cause why he should not be suspended or struck off the roll upon certain charges preferred against him by one Van Wyk. Subsequently Van Rensburg and Bierman also filed affidavits, in which they charged Krige with divers acts of professional misconduct, and the Court ordered all the charges, for the sake of convenience, to be taken together in one application.

1876
June 26,
July 4.

Van Wyk and others vs Krige.

Van Wyk had employed Krige, in the early part of 1876, in reference to the sale and transfer of the farm Turffontein. Krige undertook to settle the matter upon Van Wyk agreeing to give him half of the farm Wildebeestlaagte, or half of the farm Driefontein, the property of Van Wyk, so soon as Krige had arranged the matter. This agreement was reduced to writing. Krige, however, without carrying out his employment, effected transfer of the whole farm Driefontein upon his wife, by virtue of a general power of attorney and authority to transfer signed by Van Wyk. Mrs. Krige subsequently mortgaged Driefontein for various amounts.

Van Rensburg charged Krige with having received from him the sum of £4, with which to pay transfer duty on the farm Kleinbanksfontein, which Krige failed to do, in consequence whereof Van Rensburg had to pay double transfer-duty. He also charged Krige with receiving money on two Government drafts in his favour, without any authority from him (Van Rensburg). The respondent admitted that he had received the £4, but stated that he had forgotten to pay it over to the Government as instructed. He, however, denied having received money on the two drafts without authority from Van Rensburg.

With reference to the complaint of Bierman against Krige, it appeared from the affidavits that, in December, 1875, he delivered to Krige transfers and other documents relating to the farms Pikersdal and Palmietfontein, in order that they might be transferred to and in favour of Pick and Killiamse respectively, and also handed to Krige a sum of £11 14s., in order to cover the necessary charges. The applicant, who lived some hours on horseback from Middelburg, where Krige resided, was obliged to journey no less than twelve times to Middelburg to recover the documents from Krige. On one of these occasions Krige told applicant he had lost the transfers. On or about the 15th March, 1877, Krige informed Bierman that he had paid £3 15s. for arrear taxes on the said farms. Applicant thereupon went to the Landdrost's Office, to ascertain if this were true, and found that no such payment was entered or known in the books of the office. Applicant was eventually obliged to employ Attorney Maré, in order to compel Krige to hand back the transfers.

Cooper now moved that the rule *nisi* be made absolute.

The respondent appeared in person.

Cur. adv. vult.

Postea (July 4th).

KOTZÉ, J., after reviewing the facts, said: 'Lybrecht in his commentary on the office of notary *(Notaris ambt.)* quaintly says at p. 7, that the peculiar charm of the office of notary consists in his conducting himself honestly and in faithfully discharging the duties of his profession, and that if he fail in either of these he deprives himself of respect, and is capable of defrauding the whole world. The same may be said of an advocate and attorney. But a dishonest attorney or notary does not merely forfeit the respect, which may be attached to his office, when he is guilty of misconduct; he is directly responsible to the Court, whose officer he is, for such misconduct, and the Court will exercise its summary jurisdiction by calling such officer to account for or explain any alleged improper conduct of which he has been guilty in his capacity as an officer of the Court; and, in the event of the misconduct being clearly established, will visit him with summary punishment, such as suspension from practice, or striking him off the roll. *Van der Linden* at p. 350 (Henry's edition) lays it down that if a member of the legal profession is guilty of *prevarication, i.e.,* when, instead of faithfully supporting the interests of his client, the practitioner colludes with the opposite side and betrays the cause; he is liable to suspension or striking off the roll. There can be no doubt then of the authority of the Court over the practitioners and officers of the Court; although, of course, where the Court suspends a practitioner or strikes him off the roll he can appeal to the Privy Council. The propriety and necessity for the interference of the Court in cases of misconduct or malpractice on the part of its officers are apparent. "When an attorney (says Cockburn, C. J.) does that which involves dishonesty, it is for the interest of the suitors that the Court should interfere and prevent a man guilty of such misconduct from acting as attorney of the Court." *(In re Hill, L. R.* 3, *Q. B.* 545); and Mr. Justice

1878
June 25.
July 4.

Van Wyk and others vs Krige.

Blackburn, in the same case, says, "The principle on which the Court acts is to see that th suitors are not exposed to improper officers of the Court." And in *re Poole* (*L. R.* 4, *C.P.* 352), which was an application to re-admit an attorney who had been struck off the roll, the late Mr. Justice Willes expressed himself as follows:—"Upon the whole, looking at the power vested in this Court of admitting to the responsible position of attorneys and officers of the Court, persons who thus have the sanction of the Court for saying that *prima facie*, at least, they are worthy to stand in the rank of an honourable profession, to whose members ignorant people are frequently obliged to resort for assistance in the conduct and management of their affairs, and in whom they are in the habit of placing unbounded confidence, and looking to the fact that, in restoring this person to the roll, we should be sanctioning the conclusion that he is in our judgment a fit and proper person to be so trusted, I think we ought not to do so except upon some solid and substantial grounds." With these views I entirely concur, but it seems to me that not merely does the Court interfere to protect suitors and the public, but by interfering summarily it also protects the legal profession generally, as a class, against improper conduct on the part of one or other individual member of that profession. In a leading case on this subject, viz., *in re Blake* (30 *L. J., Q. B.*), an attorney being applied to by A to invest money for him, borrowed it upon his own security and the deposit of a mortgage deed, and afterwards committed a fraud upon A in receiving the money due upon the mortgage without communicating that fact to A, and in continuing to pay interest to him, the Court suspended his certificate for two years. The case of *in re Hill* is not merely important as approving and following *in re Blake*, but it also lays down a test by which the Court may determine whether misconduct on the part of an attorney is to be noticed and punished or not. Thus Cockburn, C. J., says: "There is one consideration which, I think, is entitled to great weight, viz, that if these facts had been brought to our knowledge (*i.e.*, the appropriation by an attorney of the balance of purchase money) upon the application of this gentleman's admission, we might have refused to admit him, and I think the fact of

his having been admitted does not alter the position; we should have considered all the circumstances, and either have refused to admit, or have suspended the admission for a time. So where a person has once been admitted we are bound, although he was not acting in the precise character of an attorney, to take notice of his misconduct." I am by no means prepared to say that this test is applicable to every case of misconduct; but it seems to me that it is, nevertheless, a safe guide in the majority of cases. It will be necessary now, therefore, to view the respondent's conduct with reference to this test. The conduct of Krige with respect to Van Wyk, obtaining from him a power of attorney by which the farm Driefontein was transferred to Mrs. Krige, and subsequently mortgaged to the detriment of Van Wyk and for Krige's benefit, seems to me a very unjust and improper proceeding, and (independently of the remedy which Van Wyk may have against Krige by action) one deserving the censure of the Court; but, standing by itself, I do not think it would justify the suspension or striking off the roll of respondent. With reference to the charge brought against Krige by Van Rensburg, the respondent's conduct is by no means free from strong suspicion; but, upon the affidavits filed, I am unable to come to a definite conclusion beyond all reasonable doubt, and, hence, in the words of the eminent Chief Justice to whom I have referred, "If there had been a conflict of evidence upon the affidavits, that might be a very sufficient reason why the Court should not interfere until a conviction had taken place." I think under the circumstances that I can not act on the charge brought by Van Rensburg against Krige as to his receiving the money on the draft and account due by the Government. Krige's conduct may have been *bona fide* or *mala fide*; into that I cannot enter according to the affidavits as they stand; although the loose practice of Mr. Krige, in accepting £4 from Van Rensburg for taxes, and then not paying it for the purpose intended, can not meet with the approval of the Court. I shall, however, draw the attention of the Attorney-General to the subject, and direct the papers to be handed to him. As regards the charge brought by Bierman against Krige, that is so clearly made out, that I have not the slightest hesitation that in this instance it is the bounden

1878
June 25.
July 4

Van Wyk and others vs Krige.

duty of the Court to punish respondent for his misconduct. Assuming that Mr. Krige, in withholding or not spending the money handed to him by Bierman, had no fraudulent intention, and upon this point I express no opinion. His conduct throughout has been so culpable and negligent that, applying the test whether or not the misconduct is such as to disentitle him to be admitted, supposing he were now applying for admission; and answering that question in the affirmative, I can not do otherwise than suspend him from practice. It is no objection to the conclusion I have come to that this charge amounts to the commission of an indictable offence, and that, therefore, the Court should not interfere until the matter has been before a jury. Assuming that it does amount to an indictable offence, I think that where the charges are either distinctly admitted (as was the case *in re Hill)*, or appear from the affidavits to be proved beyond all reasonable doubt, the Court is justified in exercising its summary jurisdiction; and, in fact, the case of *re Poole, L. R.* 4, *C. P.* 350, shews that the practice of first letting a jury decide is rather one of discretion with the Court than of law—there an attorney was charged with fraudulently misappropriating moneys intrusted to him by a client for investment. On cause being shewn, the matter was referred to the Master, who investigated the matter on affidavits and made his report to the Court, and upon his report Poole was struck off the roll.

The respondent is, therefore, suspended from practice for twelve months, and must hand up his certificate of enrolment as an advocate and attorney of the Court to the Registrar, and further pay the costs of this application.

LUCAS *vs.* RESTON.

Good-for.—Gambling.—Collection.

An action can not be maintained on a good-for given in payment of money lost at playing cards. Nor can an agent, to whom the good-for is handed for collection merely, sue on it in his own name.

1878 June 11.

Lucas vs Reston.

This was an appeal from the judgment of the Landdrost of Potchefstroom. Dargon handed to Reston for collection a good-for signed by Lucas for £3 10s. From the evidence it appeared that the good-for had been given by Lucas for money lost in card-playing. There was no assignment, or cession, of the good-for in favour of Reston, who, in his own name, sued Lucas in the Court below for recovery of the £3 10s. The Landdrost gave judgment in favour of Reston with costs.

Buskes (with *Kleijn*) for appellant.

Munich for the respondent.

The COURT held that upon the evidence the good-for was given in payment of a gambling debt, and could not, therefore, be sued on. Reston, moreover, could not sue in his own name on the good-for, which had been handed to him for collection, and was still the property of Dargon. The appeal must therefore be allowed with costs.

LEATHERN *vs.* HENDERSON AND OTHERS.

Deed of submission to arbitration—Award—Order making an award a Rule of Court set aside.

A client will not be bound by a submission to go to arbitration, signed by his attorney contrary to express instructions of the client, where such instructions were known to the opposite party, or his attorney, who, notwithstanding, executed the deed of submission. An award under such deed of submission is a mere nullity; and, on action brought, the Court set aside an order whereby the award had been made a Rule of Court.

1878
June 26.
„ 27.

Leathern vs Henderson and others.

Action brought by Leathern to have a certain deed of submission to arbitration, the award of the arbitrators thereunder, and the subsequent order, making such award a Rule of Court, set aside, on the ground of fraud:—The facts, so far as material, were as follows: There existed disputed claims between plaintiff and the executors of O'Reilly's estate. The attorney of the plaintiff, contrary to his instructions, signed a deed of submission to arbitration, which deed of submission was drawn up and executed by he attorney of the executors, he being aware at the time that the plaintiff had objected to have the disputed claims settled by arbitration. The plaintiff, upon hearing of the submission to arbitration, had a notarial protest drawn up protesting against such submission. This protest was duly brought to the notice of the arbitrators, the attorney of the plaintiff, and the attorney of the executors. Thereupon the plaintiff's attorney withdrew from the case. The arbitrators, however, more than a month after the protest had been communicated to them, proceeded to make their award. Upon application to the High Court by the attorney of the executors, the award had, in terms of the deed of submission, been made a Rule of Court.

The COURT called upon counsel for the defendants to justify what had been done.

De Vries, for the defendant, Henderson, cited *Snell on Equity*, p. 389, (3rd edn.), *Van Leeuwen, R. D. Law*, vol. 2, bk. 4, ch. 23, § 11.

Cooper, for the executors, confined his remarks solely to the question of costs, and submitted that the executors, personally, should not be ordered to pay costs.

Ford, for the attorney of the executors, argued that his client did not know that Henderson, as plaintiff's attorney, had instructions not to go to arbitration. An attorney may enter into arbitration, and bind his client thereby: *Story, Agency*, § 73. If the arbitration has been properly entered into, the subsequent protest was not binding on the arbitrators. *Russell on Arbitration*, pp. 23, 24, (4th edn.) It was the duty of the arbitrators, having accepted to act as such, to proceed with the arbitration. *Russell*, p. 188.

Meintjes, for the plaintiff, referred to *Russell*, p. 187. The award was improperly made a Rule of Court. The facts were not brought to the notice of the Court at the time. In signing the deed of submission, the plaintiff's attorney assumed an authority he did not possess. He was distinctly instructed not to arbitrate. This was also known to the attorney of the executors. The defendants, including the arbitrators, were bound by the protest. *Russell*, p. 140. The arbitrators heard one side merely, for plaintiff's attorney did not appear before them after the protest *Russell*, p. 176, 182-4. In *Dietz* vs *Pohl*, 1 *Mentz.* 397, an award, which had been made a Rule of Court, was set aside on the ground of similar irregularities.

Postea (June 27).

The COURT held that the general proposition of law could not be disputed, that an attorney in a cause has authority to enter into an agreement for arbitration. But the client will not be bound by an agreement to go to arbitration, signed by his attorney contrary to express instructions of the client, and where such instructions were known at the time to the opposite party, or his attorney, who, notwithstanding, executed the deed of

1878
June 26.
" 7.

Leathern vs Henderson and others.

submission. To hold otherwise would be a fraud upon the plaintiff. But even supposing, as was urged by Mr Ford, that the agreement to go to arbitration was binding on the plaintiff, then the notarial protest, executed immediately upon the plaintiff hearing of such agreement, and brought to the notice of both attorneys and arbitrators, virtually revoked the authority of the arbitrator appointed to represent the plaintiff, and rendered the subsequent award a mere nullity. According to *Russell*, the authority relied on during the argument, either party may at common law, after reference, but before award, revoke the authority of the arbitrator (who is acting on his behalf, and has only such authority as the party himself gave the arbitrator), and render all that has been done in the reference ineffectual; though by so doing he may make himself liable to an action. *Russell*, p. 50, 140-2, 149-50, 649, &c.; *Thompson* vs. *Anderson*, *L. R.* 9, *Eq.* 529, *et seq.* Although the Court will not, as a rule, set aside an award, where the arbitrators' authority has been revoked, because, under the circumstances, any action brought to enforce it must fail, still, where something may be done under the award, the interference of the Court will be necessary. If, now, the award has been improperly obtained, and has been made a Rule of Court, the Court will set it aside; for, if not, something may be done under the Rule of Court, which stands as a judgment, and the party might get his costs taxed and take out execution. In the present instance, there never was a proper submission to go to arbitration, binding on the plaintiff, and the subsequent award was a mere nullity. Under the circumstances, the order making the award a Rule of Court must be set aside, otherwise it would operate as a fraud upon the plaintiff. The attorney of the Executors is ordered to pay the costs.

BOSHOFF *vs.* BOSHOFF'S EXECUTORS.

Removal of Executors.—Appointment of a Curator.

Where executors in an estate did not file proper liquidation accounts, and kept open the liquidation of the Estate for three years: Held that, upon application supported by the Orphan Master, the liquidation of the estate must be placed in the hands of a curator.

1878.
July 4.
„ 18.

Boshoff vs. Boshoff's Executors.

On the 4th of July, 1878, the Court granted a rule *nisi* against the executors of the estate of the late W. H. Boshoff, to shew cause why the administration of the said estate should not, by order of the Court, be taken out of their hands. The affidavits shewed that the executors had employed one Herbert Brown to draw up the liquidation accounts for them, they not being able to do so themselves. Some of the heirs in the estate objected to these liquidation accounts, which they alleged prejudiced their interests. There was also an affidavit by the Orphan Master setting forth that several liquidation accounts had been filed by the executors, none of which gave satisfaction; that the estate had been in liquidation for three years; and that it was advisable to place the liquidation of the estate in the hands of a curator.

The rule *nisi* was served at the dwelling-house of the executors, upon the son of one of them. There was no appearance for the executors on the return day of the rule.

Cooper, for the applicant, moved that the rule be made absolute (§ 27, *Ordinance* No. 12, 1870.)

The COURT made the rule absolute, and appointed C. A. Celliers, in his capacity as Secretary of the Transvaal Board of Executors, curator to the estate.

The Queen *vs.* Booth.

Indictment for Murder.—Plea of Insanity.

1878.
July 20.
" 23.
The Queen vs. Booth.

Kotzé, J., in summing up to the Jury, said:—The prisoner at the Bar stands charged with murder, and you must bear in mind, first, the nature of the charge against the prisoner, and, secondly, the nature of the defence set up in answer to that charge. The learned counsel for the prisoner has given you a definition of murder, which can not be accepted. He has told you that by Roman Dutch Law a motive, such as some gain or advantage, must be proved for the prisoner killing the deceased, otherwise he can not be found guilty of murder. It is true that this is Van der Linden's view; and although the Court is, by the Grondwet and Thirty-three Articles, directed to take the law as Van der Linden lays it down, there is this very important qualification, that Van der Linden is only to be accepted in such a way as not to conflict with the general law and practice of South Africa. In the Cape Colony, and Natal, like in this Territory, the Roman Dutch Law is the common law of the country. But the Judges administering the law in the older Colonies of South Africa have invariably given a definition of murder altogether different from that relied on in favor of the prisoner. Questions of law come within the province of the Judge, for which he alone is responsible. You, on the other hand, have to try the facts, and come to a conclusion on those facts, tested by the law as laid down by the Judge. It is necessary for me to bring this to your attention, and to clear your minds from any erroneous impression which the argument of counsel may have produced. By the law of this country murder may be defined as the killing of a human being with malice aforethought, express or implied; in other words, it is the unlawful and intentional killing of a human being. The intention to kill is often manifested by words uttered previous to the commission of the deed. But it is much more frequently manifested by the instrument used: and therefore,

if the accused employed an axe, a sword, or a gun, the instrument used would shew an intent to kill. And, further, if you are satisfied that the prisoner killed the deceased, then the presumption of law is that the killing was done maliciously: in other words, that it is murder. The moment the fact of killing by the prisoner has been proved, the presumption is that he acted maliciously, that he meant to kill, and it lies upon him to rebut this presumption, and to show that, under the circumstances, it is not murder. The question then, of absence of motive, or apparent motive, you must keep out of your minds, in deciding whether the prisoner is guilty, or not, of murder. It may be material when we come to consider the question of insanity, but with the mere naked definition of murder it has nothing to do. Suppose that one of you, riding home from the Court to your farm, were suddenly to meet a Kafir, whom you had never seen before, and this Kaffr discharged a loaded gun at you and killed you. The Kafir then, without robbing you of anything, disappears. Here there is an apparent absence of motive—the existence of a motive cannot be proved, but yet it is quite clear that the killing amounts to murder. If therefore, you are satisfied that the prisoner killed Sergeant Newman, the fact of killing raises the presumption of murder. But not only is there the presumption from the mere fact of killing, look at the instrument used, which was a loaded rifle, discharged at Newman, who was sitting in his tent. The use of the instrument manifests a malicious intention, and it lies upon the prisoner to satisfy you that the circumstances under which he acted were such as will deprive the offence, which, *prima facie*, is murder, of its criminal character. The defence is, that the prisoner could not control himself. It is, therefore, admitted that the act was done, but it is urged that at the time of commission the prisoner was insane. Now, insanity, if established, is a clear answer to the charge, and here I must tell you, that the onus of proving insanity rests upon the prisoner. The law very justly presumes that every human being is a responsible being, and until the contrary be shown, bevond reasonable doubt, the presumption that he is a rational and sane being must prevail, and he is, therefore, answerable for his conduct in a court of law. If

1878.
July 22.
" 23.

The Queen vs. Booth.

the onus of proving insanity lies upon the prisoner, it follows that in case of doubt you must hold the prisoner was a rational and sensible being at the time, and if the killing be proved, you must find him guilty of murder. I crave your careful attention to what I am about to say, bearing in mind that the prisoner must be presumed to have been sane when he committed the act, until the contrary is proved beyond reasonable doubt. The question of insanity is as serious and difficult a question as a jury could possibly deal with. The medical witnesses have stated that it is impossible clearly to lay down a line between sanity and insanity. You must judge of the question by all the facts and circumstances of the case. And you must weigh them with the utmost caution and care, lest (as it has been very truly observed by a very eminent Judge of Criminal Law) on the one hand you do injustice to the weakness of human intellect or human nature, and, on the other hand, again, lest you should show too great indulgence for the commission of serious crime. In law it is not every delusion, nor every species or kind of insanity which may be known to the medical profession, that is recognised as insanity. The question received very serious consideration in England in the case of the *Queen* v. *McNaughten*. McNaughten was indicted for murder, and the defence set up was insanity. The question, on a technical point, ultimately came before the House of Lords. The House of Lords consulted all the Judges, and the result was that, in order to establish a plea of insanity, it must be shown that the prisoner, at the time he committed the act with which he is charged, was suffering from a defect of reason or understanding caused by mental disorder, so that he did not know the nature and quality of the act; or, if he knew the nature and quality of the act, that he did not know he was doing an act which was wrong. The simple question, therefore, for you to decide is this—Did the accused, at the time of committing the act, know right from wrong? In other words, Did he know he was committing a wrongful act, contrary to the law of the land? I may state to you here that even if the prisoner acted under a delusion, that will not be any justification in answer, unless such delusion hid from the mind of the prisoner, or made him incapable of understanding, or

appreciating, the criminality of his act. It appears, according to the weight of the medical testimony, which you have heard, that there is a species of insanity known to the faculty which has been variously called moral insanity or homicidal mania; that is, where the prisoner may not have been under any delusion, may have been able to distinguish at the time right from wrong, but was goaded on by some irresistible impulse, which it was utterly out of his power to control or resist. Whether or not such a phase of insanity is accepted by the medical faculty generally I am unable to say, but I must tell you that it is wholly unknown to the law; in fact, it is altogether ignored by the law. The simple test which the law provides in a case like the present is: Did the prisoner, at the time, know he was doing an act that was wrong? If you are satisfied that he knew that, you will have to find him guilty; notwithstanding that he may have been excited, and his mind partially deranged in a medical sense. But if you are satisfied that he could not distinguish right from wrong, then you are bound to acquit him of the crime with which he is charged. You may take it as clearly proved that the prisoner was addicted to drink, and that at times he drank very hard indeed. It is also clearly proved that he had long intervals of sobriety, and that on such occasions he was seized by what was described by some of the witnesses as religious fits. They meant to say that he seemed to reform in his conduct, and go to Church more regularly than before; and I call your very careful attention to this circumstance as to the capacity of the prisoner to distinguish between right and wrong. [The evidence as to the prisoner's habits since he had joined his Regiment was then reviewed.] There is also evidence that the prisoner's skull is not in its normal condition. Some of the medical witnesses say the prisoner was born so; others, again, think that the impression produced on the skull, and the peculiar abnormal condition of the left side of the skull, may have been produced by wounds, the marks of which are still on the skull. All the medical witnesses, however, agree in this, that although it cannot be said with certainty that the injuries to the head have caused insanity, yet these injuries suggest a cause of insanity. The doctors have testified, and their evidence is

1878.
July 29.
to 28.

The Queen vs. Booth.

entitled to great weight, that all the acts and conduct of the prisoner, as deposed to by the several witnesses, are consistent with the hypothesis of sanity, and also with the hypothesis of insanity. If therefore, you think that in strictness you are bound to return a verdict of guilty, but that, regard being had to the medical testimony in favor of homicidal mania together with the facts in this particular case, there is sufficient to justify you to couple with your verdict a recommendation to mercy, it is free to you to do so. Further and later inquiry may yet prove that medical science is correct in holding that homicidal mania is a distinct species of insanity, and that the view which the law takes of it is erroneous.

BOURHILL *vs.* WATSON & Co.

Landdrost's Jurisdiction.—Splitting of Demands.

One and the same cause of action, exceeding in amount the Jurisdiction of the Landdrost, can not be split into three, in order to bring the three separate demands within such Jurisdiction.

1878.
July 31.

Bourhill vs. Watson & Co.

This was an appeal from the decision of the Landdrost of Middelburg, and was heard before the High Court sitting at Middelburg. Three summonses had been issued by Watson & Co., the plaintiffs below, against Bourhill, the defendant below, for the recovery of three separate amounts, viz., £11 11s. 4d., £23 13s. 4d., and £36 3s 8d., being a balance on an account current between the parties. The Landdrost gave judgment, in each instance, in favour of Watson & Co., the plaintiffs, with costs.

Cooper (with *Hollard*) for the appellant.

De Vries for the respondent.

The COURT held that the several amounts sued on were substantially of the same nature, being a balance on an

account current between the parties. The amounts, taken together, were above the jurisdiction of the Landdrost, and the plaintiffs below had purposely split them so as to bring them within the jurisdiction of the Landdrost. This, on the authority of *Benningfield* vs. *Duckett*, 3 *Menz.*, 451, the plaintiffs had no right to do. The appeal was accordingly allowed with costs.

1878.
July 31.
Bourhill vs. Watson & Co.

BREYTENBACH *vs.* THE QUEEN.

Conviction by a Landdrost.

A conviction by an Acting Landdrost quashed, where such Landdrost had also acted as prosecutor against the prisoner, and had not been properly appointed Public Prosecutor.

1878.
August 28.
Breytenbach vs. Reg.

The applicant, one Breytenbach, had been prosecuted before the Acting Landdrost of Utrecht, and found guilty of the crime of extortion. He was, thereupon, sentenced to pay a fine of £10 and costs. The proceedings in the Court below were now brought in review before the High Court, sitting at M. W. Stroom.

Hollard (with him *De Vries*) contended that the Acting Landdrost, who tried the case on the 22nd March, 1878, had, in February, 1878, acted as Public Prosecutor when a preliminary examination was taken against Breytenbach for the same crime for which he received sentence on 22nd March. He referred to § 8, *litt. d. Criminal Procedure*, *Wilkinson* vs. *Public Prosecutor*, 3 *Menz.* 459.

Jorissen (Attorney-General) admitted that the Acting Landdrost, who had sentenced applicant, had also acted as Public Prosecutor at the preliminary examination held against him. He, however, maintained that as the notice of review, served on him, stated that applicant would apply to have the sentence quashed on the ground of his innocence, it was not now open to his Counsel to rely upon any

1878. August 28. — Breytenbach vs. Reg.

technical objection to the proceedings in the Court below. He further stated that the Acting Public Prosecutor, Mr. Roberts, who had also acted as Landdrost, had not been appointed by him, the Attorney-General, nor with his knowledge or approval as required by law. *Crim. Procedure* §§ 10-13. [It appeared that Mr. Roberts had been appointed Public Prosecutor by a letter directed to him by the Secretary for Native Affairs.]

The COURT ruled that, upon both grounds, the sentence against Breytenbach must be quashed.

Ex parte McGREGOR.

An attorney, who merely collects money for a client, is in the same position as an agent, and can only charge the percentage for collection allowed to agents by § 15 *of Ordnance No.* 5, *of* 1871.

1878. August 28. — Ex parte McGregor.

Messrs. H. & K., attorneys, had been instructed by one Page to collect the sum of £25 on a promissory note made by the applicant. Upon demand made, applicant paid the amount of the promissory note. Messrs. H. and K. charged applicant 10 per cent. for collection. The question was whether Ordinance No. 5, of 1871, § 15, applies to attorneys as well as agents ?

The COURT held that § 15 of the Ordinance applies also to attorneys, who collect money as agents practising in the lower Courts. As the sum collected exceeded £10, the attorneys were merely entitled to 5 per cent. for collection.

Uys *vs.* Vos.

An attorney not allowed his costs as between attorney and client.

1878.
August 26.
Uys vs. Vos.

In this case the action and facts were similar to the action and facts in a previous case of Uys *vs.* Vos, between the same parties, in which, on 24th August, 1878, the High Court, sitting at M. W. Stroom, had given judgment in favour of the defendant.

The Court ruled that in the present case no costs, as between attorney and client, shall be allowed to the attorney of the plaintiff, on the ground that there was no necessity to make a separate trial case of this matter, which could, and ought to, have been tried, with the previous case of *Uys* vs. *Vos*, together in one.

Loots *vs.* Van Vuren.

Exception to summons upheld.

1878.
September 10.
Loots vs. Van Vuren.

In this case an exception was taken by the defendant that the summons served on him is not a true copy, inasmuch as it contains no date, nor were any copies of the original documents annexed to the summons served upon him, as required by the 8th and 13th Rules of Court.

The Court upheld the exception.

EVANS VS. WATERMEYER.

Where a plaintiff described himself as Secretary to the Board of Executors, Potchefstroom, it was held that he could, in his own name, maintain an action on a good-for given him by the defendant.

1878
September 17.
—
EVANS VS.
WATERMEYER.

This was an appeal from the decision of the Landdrost of Potchefstroom. Evans had agreed with the Potchefstroom Board of Executors to give transfer to Landsberg, whose agent the Board was, of a certain farm, on Landsberg or his agent ceding to him (Evans) certain claims. Evans thereupon handed the title deeds and transfer of the farm to Watermeyer, the Secretary of the Board. Evans, finding it inconvenient to pay Watermeyer the expenses of transfer in cash, gave him a good-for in the following form :—

"Good-for to A. G. Watermeyer, Esq., the amount of expenses to be incurred in transferring the farm Vaalkop, district Rustenburg, from me to E. Landsberg, Esq., Capetown, C. G. Hope.

JAS. EVANS."

Watermeyer, having duly transferred the property to Landsberg, made out an account and demanded payment of £14 18s 6d., being the expenses of transfer, from Evans, who refused to pay the same. Watermeyer thereupon sued Evans in the Landdrost Court upon the good-for and the following account :

JAMES EVANS, Esq.,

Dr. to A. G. WATERMEYER,
Secretary Board of Executors, Potchefstroom.

To the undermentioned disbursements, *re* transfer of Vaalkop to Landsberg—

1876, May 13.—To Transfer Duty, 4 per cent. on £300	...	£12	0	0
,, Transfer Deed		0	10	6
,, Registration		0	2	6
,, Stamp on Transfer		1	0	0
,, ,, on Power of Attorney and substitution		0	4	6
,, Conveyancing fee		1	1	0
	£14	18	6	

1878.
September 27.

Evans vs.
Watermeyer.

Evans excepted to the claim in the Court below, on the ground, that Watermeyer could not sue for a debt due to the Board, but that, according to the trust deed, the Trustees of the Board had to sue. The Landdrost overruled the exception and gave judgment for Watermeyer with costs.

Buskes for the appellant.

De Vries (with him *Munich*) for the respondent.

KOTZE, J., I think the Landdrost very properly overruled the exception. The good-for was given to Watermeyer personally. The account mentions that Watermeyer is the Secretary of the Board of Executors, but that is mere matter of description. The cause of action is founded on the good-for, and there can not be any doubt that the money was really due and owing by Evans. The appeal must be dismissed with costs.

SPIES *vs.* HOLTSHAUSEN.

Landdrost.—Interdict.

Under § 55 of the Civil Procedure of 1874, a Landdrost can not grant an interdict against property situate within his district, but possessing a value above the jurisdiction of the Landdrost.

1878
July 30.
October 15.

Spies vs.
Holtshausen.

This was an application, heard before Kotzé, J., at Middelburg, to have certain interdicts, granted by the Landdrost of Middelburg, restraining the transfer by Spies of the farm Aasvogelkrans, set aside upon the ground—1st, that the Landdrost had no jurisdiction in the matter, and 2nd, if the Landdrost had jurisdiction, Holthausen was bound by the local law to go on with his action at the next ensuing sitting of a competent Court.

Hollard, for the applicant, cited *Grondwet,* § 167.

1878.
July 30.
October 15.

Spies vs. Holthausen.

De Vries for the respondent, maintained that the Land-drost had jurisdiction under the *Grondwet* and § 55 of the *Civil Procedure Act*, 1874. *Van der Linden*, p. 331, 328, n. 5, 320. Section 55 of the *Civil Procedure Act*, is conclusive on the point. The Landdrost is hereby authorised to grant interdicts, to any extent or amount, against property within his jurisdiction, that is within his district. Holthausen was not bound to proceed with an action within any certain or definite time.

Hollard, in reply: The question is, in what sense is the term *jurisdiction* used in § 55 of the *Civil Procedure?* Reading § 167 of the *Grondwet* together with § 55 of the *Civil Procedure*, it is clear that by *jurisdiction* is meant not a limit as to place, but a limit as to money value. If the value of the property interdicted is above the jurisdiction of the Landdrost, that is above £37 10s., then, although the property is situated in the district, the Landdrost has no jurisdiction. The affidavit filed shews the farm was sold for £500. Having obtained the interdict, Holthausen was bound to bring his action at the first ensuing sitting of a competent Court, in order to get the interdict confirmed. Section 167 *Grondwet.*

Cur. adv. vult.

Postea (October 15*)*, on the return of the Judge to Pretoria.

The COURT held that § 167 of the *Grondwet* gives a Land-drost power to grant a provisional interdict in any civil case, irrespective of its nature, or the value or amount in dispute, against the moveable and immoveable property of a debtor. Such interdict is only provisional, when granted, and the creditor is bound to summon the debtor at the next sitting of a competent Court, in order to have the interdict made absolute and his claim against the debtor established. The *Civil Procedure Act*, § 55, has narrowed the power given by the *Grondwet* to the Landdrost in granting interdicts. A Landdrost can only now grant an interdict under the circumstances mentioned in § 167 of the *Grondwet*, where the debt or claim due to the creditor is within the jurisdic-tion of the Landdrost, *i.e.*, the jurisdiction of the Landdrost

with respect to the nature or value of the question in dispute, and not his jurisdiction in the sense of the local limitation of his district. The property in dispute was sold for £562, an amount far above the jurisdiction of the Landdrost. The interdicts must therefore be set aside.

1878.
July 30.
October 15.

Spies vs. Holtshausen.

PERRIN *vs.* POTGIETER.

Where the appellant had agreed to return certain oxen, or their value, which he had exchanged for a horse with the respondent, if the latter brought him the skin of the horse, in case it should have died of horse-sickness; Held that this was not a condition precedent, and that there being satisfactory evidence that the horse died of horse-sickness, the respondent was entitled to sue for return of the oxen or their value, although he had failed to bring the horse's skin to appellant.

This was an appeal from the judgment of the Landdrost of Pretoria. The summons in the Court below was founded on the following document:—

"If Mr. Potgieter, to whom I have sold a roan gelding for six oxen, brings me the skin of that horse where a 6 (six) is burnt in it, I shall, if the horse died from horse-sickness, but not otherwise, from to-day to the end of May next, pay him the oxen back.

(Sgd.) PAUL PERRIN.

Pretoria, 11th March, 1877.

The Landdrost, on the evidence, found that the horse died from horse-sickness before May, 1877, and held that the words "brings me the skin of that horse where a 6 is burnt in it" in the agreement sued on, did not amount to a condition precedent, but the meaning of the words were that the skin of the horse should be produced to Perrin in order that he might satisfy himself that the horse was really dead. Judgment was accordingly given in the Court below in favour of Potgieter with costs.

1878.
November 7.

Perrin vs. Potgieter.

1878. November 7. — Perrin vs. Potgieter.

Hollard, for the appellant, argued that the respondent was bound to comply with the terms of the agreement, which distinctly requires that he should bring the skin to appellant before the latter could be required to restore the oxen. However absurd this may be, it was not an impossible condition nor *contra legem.* He cited *Voet* 19, 1, 23.

Preller, for the respondent, contended that by the agreement Perrin had no right to the skin. The term *brings* merely meant *produces* for the purposes of identification.

The COURT held that by the agreement the appellant contracted to return the oxen if there were clear evidence the horse had died of horse-sickness. The word *brings* does not mean delivers up, but shews or produces the skin. Suppose the appellant were present and saw the horse die, could he relieve himself from liability by saying the respondent had not brought him the skin? Clearly not. The appellant, according to the evidence, sent someone to dissect the horse in order to satisfy himself the horse had died of horse-sickness. The appeal must therefore be dismissed, and the judgment below varied into a judgment for the plaintiff for the six oxen, or their value £30, with costs.

O'REILLY *vs.* LEATHERN.

General Issue.—Plea of Payment

1878. December 11. — O'Reilly vs. Leathern.

In this case, which was an action on an I.O.U. for £40, the Court held, as there was no special plea of payment by the defendant, but only the plea of the general issue, it could not entertain the defence of payment by defendant, counsel for the plaintiff having objected thereto.

REX *vs.* STAMP.

Lessor and Lessee.—Tortious Act of third party.

A lessee is not entitled, by reason of the prima facie *tortious act of a third party, interfering with the due enjoyment of the premises leased, to an abatement of rent or cancellation of the lease.*

1878. September 14. 1879. January 20.

REX vs. STAMP.

This was an action for the specific performance of a certain contract of lease by defendant, the payment of £3,000, as damages sustained by plaintiff, or otherwise that the said lease may be cancelled; and the further sum of £2000 as compensation be paid to plaintiff for permanent expenses and improvements laid out and done to the premises demised.

On the 23rd December, 1876, the plaintiff and defendant entered into a written agreement at Potchefstroom, whereby the defendant leased to the plaintiff for the period of ten years, commencing from the 1st January, 1877, at a rental of £475 per annum, payable in instalments, three mills and a wool-washery, situated on the Mooi River, and also two dwelling houses, outbuildings, grazing ground, &c., situated on, and belonging to, the farm "Vyfhoek," Potchefstroom. The plaintiff entered into possession and improved the wool-washery. At the time he leased the mills and wool-washery until December, 1877, there was sufficient water to drive and work them all. Towards the end of 1877, however, the water supply began to slacken, and there was not enough water in the river for the purpose of working the three mills and the wool-washery. The upper proprietors along the Mooi River had diverted water for their mills and for irrigation, and by reason thereof the plaintiff had no longer sufficient water for his mills and wool-washery. The defendant at the time of the agreement, pointed out to the plaintiff the water furrow leading from the river to the premises leased, but did not in any way directly or indirectly cause the diminution in the flow of the water, of which the

1878. September 14. 1879. January 20.

Rex vs Stamp.

plaintiff complains. The Judge inspected the locality and found that there was sufficient water left in the Mooi River, where the plaintiff's furrow leads out of it, to enable him to drive either the mills or the wool-washery, but not both together; and that certain upper proprietors had diverted more water than was required for their mill.

Hollard (with him *Keet*), for the plaintiff, cited *Van der Linden*, p. 237, 238. *Rubidge* vs. *Hadley*, 2 *Menz.*, 88.

Van Eck, for the defendant, argued that plaintiff had the remedy in his own hands. He referred to *Van der Linden*, p. 163 (Dutch edition).

Cur. adv. vult.

Postea (January 20).

KOTZÉ, J.: Upon the facts it was contended that the defendant was bound to secure the plaintiff in the quiet and undisturbed enjoyment of so much water as the latter required, for the purpose of driving the mills and wool-washery leased by him; and further, was liable for all damage sustained by the plaintiff on account of the diversion of the water by the upper proprietors. In support of this contention the plaintiff's Counsel relied on *Van der Linden*, Bk. 1, ch. 15, § 12. and *Rubidge* vs. *Hadley*, 2 *Menz.*, 88.

The lessor is not liable for damage or loss sustained by the lessee by *vis major*, the inroad of enemies, and the like; nor is he liable for damage caused by a third party without any *dolus* or *culpa* on his part. He would, however, have to allow a *remissio pensionis*, or abatement of the rent, which is the precise point decided by the case of *Rubidge* vs. *Hadley*, unless the damage caused could, under the circumstances, have been foreseen, and might therefore have been prevented. The lessee might also cancel or abandon the lease altogether, where it is impossible for him to enjoy or use the thing for the purpose leased. The same principle applies where the lessee (conductor) is prevented from using and enjoying the thing leased, by reason of the exercise by a third party, of a clear right, *e.g.*,

1878 September 14. 1879. January 20 — Rex a. S tam

an ordinary right of property. *Dig.* XIX., tit. 2, l. 33, l. 34, l. 25, § 2. *Cod. de locat. cond.* l. 1, l. 28. *Voet* XIX., 2 n. 23, 24. *Glück, Pandecten* Vol. 17, §§ 1050, 1051.

In the *Digest,* XIX., tit. 2, l. 25, § 2, Gaius puts the case of the lease of a Dining Hall, the windows of which have been darkened by the building of a neighbour. The lessor would, under the circumstances, not merely be liable to the tenant, but the latter could, without doubt, also abandon the lease, and, in the abatement of the rent, the interest will also be computed. In the case here supposed, the neighbour has not been guilty of any tortious act, he has simply exercised an ordinary right of property, which is *prima facie* lawful, for *qui suo jure utitur neminem laedit,* and this the lessor can by no means prevent (cf. *Glück,* l. c. p. 366). But where the infringement of the lessee's right, or the disturbance to his possession, is caused by the tortious or wrongful act of the third party, the case is different. The rule of the civil law, which holds that the contract of lease is entirely a matter between *locator* and *conductor,* and gives the latter no separate right or remedy against third parties, was not adopted in Holland. *Grotius,* Bk. II., ch. 44, § 9, says that by the law of that country the lessee has a distinct and independent right of his own. I observe that Mr. Maasdorp, following Mr. Herbert, has in his translation of this passage rendered the words *eenig eigen recht*—"a right of ownership;" but this is an error, for the lessee can in no case have a right of ownership, nor has he, unlike the *emphyteuta,* even a *dominium utile.* In fact, *Grotius* himself says, that the reason the lessee has a distinct right of his own (*eenig eigen recht*), is because he has a temporary use (*Bruik*) of the thing. As the lessee has a right of his own, it follows that he must have a remedy for the protection of that right, whether by interdict or action, for *ubi jus ibi remedium* Accordingly, *Merula* lays it down that "a hirer is entitled to the writ of maintenue for the enjoyment of such right as he possesses, even against the dominus, or lessor." *(Manier van Proced.,* lib. IV., tit 24, cap. 10, N. 8, *in notis.)*

In the present case, the plaintiff complains that he has been prevented from using the water of the Mooi River for the purpose of the mills and wool-washery he leased from the defendant, by reason of the *prima facie* wrongful act of

1878 September 14. 1879. January 20.

Rex s. Stamp

one or other of the upper proprietors along the stream. It has been shewn that one upper proprietor, at least, has diverted more water than is required for his mill, and hence, as this, in the absence of a better or superior right in such upper proprietor, would be a tortious and wrongful act, the plaintiff, or lessee, has his remedy against the upper proprietor in the first instance, and is not entitled now to have his lease cancelled, or to an abatement of the rent. There must, therefore, be judgment for defendant with costs.

WEATHERLEY *vs.* WEATHERLEY.

Divorce—Jurisdiction—Prorogation—Domicile—Bona fide *Residence—Connivance—Condonation—Collusion.*

The mere consent of the parties, in questions involving their matrimonial status, cannot give the Court jurisdiction, where, in the absence of such consent, the Court will not have jurisdiction. The Court can, of its own mere motion, and in the absence of a declinatory exception pleaded by defendant, raise the question of jurisdiction.

To constitute a domicile of choice these two essentials must concur: 1st, Actual residence in the new place or country. 2nd, An intention of remaining there so as to make it one's permanent home.

The Court has jurisdiction, on the ground of adultery committed in the Transvaal, to dissolve a marriage contracted in England between the parties, whose domicile is English, but who are bona fide *resident in the Transvaal.*

Connivance exists where the plaintiff, by his acts and conduct, has either knowingly brought about, or conduced to the adultery of his wife; or where he has so neglected and exposed her to temptation, as under the circumstances of the case he ought to have foreseen would, if the opportunity offered, terminate in her fall. So, where the

plaintiff, having become aware of an improper intimacy existing between his wife and the co-respondent, remains passive and permits the intimacy to continue, taking no steps to protect his wife and to avert the coming danger, he will be held to have connived at her subsequent adultery.

To establish condonation there must be evidence that the plaintiff agreed to take the defendant back as his wife, rectain et integram.

Where, after the plaintiff had determined to sue for a divorce, he proposed a marriage between his wife and her adulterer, and consented to provide the wife with money to support herself during the continuance of such illicit union, a marriage between the wife and the adulterer being forbidden by Roman Dutch Law, the Court dismissed his summons for divorce a vinculo.

1878
Nov 22 to 30.
December 2.
" 9.
" 10.
" 11.
1879.
January 20.

Weatherley vs. Weatherley.

This was an action for divorce *a vinculo matrimonii*, brought by the husband, Colonel Weatherley, on the ground of his wife's adultery, alleged to have been committed in Pretoria, with one Gunn of Gunn, otherwise known as Captain Gunn, at divers times between the 1st day of June and 20th day of October, 1878. The summons also prayed that the custody of the children born of the marriage between plaintiff and defendant, may be entrusted to the former. The pleas were: 1st, A general denial of the adultery charged. 2nd, Connivance. 3rd, Condonation. 4th, Collusion. The replication was general. The facts, so far as material, sufficiently appear from the judgment.

Cooper, with him *Hollard*, for the plaintiff. The question of jurisdiction, not having been raised by the pleadings, can not now be gone into. Having pleaded to the summons, the defendant has submitted herself to the jurisdiction. *Van der Linden*, p. 414, (Henry's translation). The Court can not leave the plaintiff, who resides in the Transvaal, remediless. *Van Leeuwen Com.*, Bk. 5, ch. 6, § 1, and ch. 8, § 4, *Merula*, lib. 4, tit. 40, ch. 1, n. 1; lib. 5, tit. 40, ch. 2, n. 1. If the defendant does not choose to except to the jurisdiction, the Court cannot of its own mere motion raise the

1878
Nov. 22 to 30.
December 2.
" 9.
" 10.
" 11.

Weatherley vs. Weatherley.

question of jurisdiction. *Kersteman Regt. W. Boek, in verb. Jurisdictie.* The Proclamation of 18th May, 1877, establishing this Court, gives jurisdiction in all matters and proceedings in this territory over all Her Majesty's subjects. The ground upon which a divorce is sought in the present case is adultery by the wife, which is recognised in all Protestant countries as a cause for divorce. In *Reeves* vs. *Reeves*, 1 *Menz.* 244, reference is made in the argument to *Cole* vs. *Cole* and *Newberry* vs. *Newberry*, where an English marriage between parties domiciled in England was dissolved at the Cape of Good Hope on the ground of adultery committed at sea. Expediency is altogether in favour of assuming jurisdiction in the present instance, *per* Burton, J. *Mackie* vs. *Philip*, 1 *Menz.* 460, *Witham* vs. *Venables*, 1 *Menz.* 291, *Dunlevie* vs. *Harrington and Edney*, 292. In *Rhodes* vs. *Rhodes*, this Court recently granted a divorce *a vinculo* on the ground of adultery by the wife, although the marriage was between English subjects, and contracted in England.

[KOTZÉ, J.: In that case there was no question as to the domicile of the parties being in the Transvaal or not.]

The law of this country is the Roman Dutch Law, to which all parties, even those temporarily residing here, are subject. *Story, Conflict of Laws*, § 46. Adultery by the wife has been proved by the evidence. *Roscoe, nisi prius*, p. 433, 8th edn., *Bishop Comment.*, vol. 2, § 619 (edn. of 1860), *Best, On Evidence*, § 433. There is no collusion in this case. *Browning on Marriage and Divorce*, p. 151. The parties have not conspired to prove a false case, nor have they conspired to hold back what would be a good defence. This being so, there is only one other possible manner of colluding, viz., by agreeing to prove a real case. The plaintiff never agreed to this effect. Under the circumstances of this case there is no collusion. *Bishop*, vol. 2, chap. 3, § 28. Collusion cannot be presumed. *Bishop*, § 29-30.

[KOTZÉ, J.; Did the plaintiff and defendant not agree that, when divorced, Mrs. Weatherley should marry Gunn ?]

That is a very different thing from consenting that, instead of marrying Gunn, Mrs. Weatherley and he should continue to live in adultery. If Mrs. Weatherley wished to marry Gunn, why should Colonel Weatherley not consent to this without being guilty of collusion?

Ford, for the defendant: It is no answer to say there is no plea to the jurisdiction. Not merely can the Court of its own mere motion raise the question of jurisdiction, it is bound to do so. *Browning, Marriage and Divorce,* p. 54 and *seq.* There must be permanent residence or domicile to found jurisdiction in this case. Mere consent of parties can not give jurisdiction in a case like the present. It may often happen that facts, suggesting the question of jurisdiction, only come to light during the trial. Is the Court then precluded from raising the question simply because it has not been pleaded? *Clough* vs. *London & N. W. Railway Co.,* 45 *L. J., N. S. Story,* § 204-5, *et in notis. Niboyet* vs. *Niboyet, L. R.,* 3 *P. D. Van Leeuwen* and *Merula,* relied on by counsel for the plaintiff, merely refer to questions of ordinary civil contracts, and not to questions of status and divorce. *Story* § 540, 543. *Van der Kessel* shews there can be no jurisdiction where there is no domicile. *Th.* 30, *Th.* 34, *et in notis.* [Counsel then argued on the evidence, and submitted there was no satisfactory proof of adultery by the defendant.] There was connivance on the part of the plaintiff. When Colonel Weatherley left for Capetown, he was aware that Gunn had kept up an illicit intercourse with a native woman. He leaves his wife to the care of this man, during his absence in the Cape Colony. In Capetown, the Colonel discovers that Gunn was an impostor, and instead of writing to Mrs. Weatherley that she was to break off all connection with Gunn, he sends her a telegram from Capetown approving of her standing by Gunn during the Preliminary Examination against him. *Browning,* p. 133, *in notis.* Colonel Weatherley, having exposed his wife to temptation, is the author of his own wrong. There is collusion in this case. The plaintiff has admitted there was an arrangement entered into by which Mrs. Weatherley was to marry Gunn when divorced. The evidence has clearly established the fact that all through the parties played into each others hands.

1878
Nov. 22 to 30.
December 2.
" 9.
" 10.
" 11.
1879
January 20.

Weatherley vs. Weatherley.

De Vries, on the same side, cited *Van der Linden*, p. 280 (Dutch edition). *Huber, Jus. Hodiernum*, bk. 4, ch. 14, §§ 20, 21, 24, 38, 53.

Cooper, in reply: The references to *Van der Keessel* merely shew that persons, only temporarily in Holland, are not subject to military service, or other duties imposed by local statutes. They have no application to the present case.

Cur. adv. vult.

Postea (January 20).

KOTZÉ, J: The parties were married in England in January, 1857, the plaintiff being at that time a lieutenant in a cavalry regiment. After the marriage, Colonel Weatherley and his wife proceeded to India. They subsequently returned to England, and left again in 1875 for South Africa, arriving in the Transvaal in January, 1876. Their domicile of origin is English, but the adultery, if any, was committed within this Territory. During the hearing of the case, owing to the facts disclosed in evidence, I directed counsel, after the evidence had been taken, to argue the legal question—whether, or not, the Court had jurisdiction to entertain this suit for divorce, supposing the parties not to have acquired a new civil domicile of choice in this country.

It was accordingly maintained on behalf of the plaintiff that there ought to have been a dilatory plea, or exception, to the jurisdiction of the Court filed by the defendant, and that this not having been done, the Court cannot, according to the Roman Dutch Law which prevails in this country, of its own mere motion raise the question of jurisdiction. Two authorities were cited in support of this position, viz., *Merula, Man van Proced.* (civ. pract.) lib. IV., tit. 40, ch. 1, n. 1, and *Van der Linden*, p. 414 (Henry's translation). But on examination it will be found that these writers, especially *Merula*, merely lay down that if the defendant wishes to take objection to the jurisdiction of the Court, he must do so by way of preliminary exception before he pleads over, otherwise he submits himself to the jurisdiction of the Court; and not that if he neglects to file a declinatory exception the Court

1878
Nov. 22 to 30.
December 2.
" 9.
" 10.
" 11.
1879.
January 20.

Weatherley vs Weatherley.

is bound to hear the case. A similar rule is known to the English Common Law, by which a dilatory plea, *e.g.*, to the jurisdiction, was not available after a plea in Bar. So it was further argued on the authority of *Van Leeuwen* (Rom. Dutch Law, lib. V., chap. 8, § 4) that, by not having pleaded to the jurisdiction, the defendant must be taken to have tacitly consented that the Court should have jurisdiction, and the Court was consequently precluded from raising the point at the trial. Here, then the question at once arises whether the mere consent of parties can give the Court jurisdiction ? The passage in *Van Leeuwen* must be taken to refer to matters of a purely private and doubtful nature only ; and it is not now necessary to inquire how far, in matters of this kind, the doctrine " that consent of parties gives jurisdiction *(prorogatio,)* propounded by the Roman Jurists, when treating of the provisions of the *Lex Julia Judiciorum*, and followed by the commentators of a later date, has effect at the present day. *Van der Linden*, in his supplement to *Voet (ad Pandectas* lib. II., tit. 1, § 14*)*, says :—" *Cum diversorum tribunalium institutio ad statum publicum pertineat ; nec pactionibus privatorum hominum Juri publico derogari possit.*" Now, although the law of domestic relations is treated of as a portion of the *Jus privatum*, the institution of a tribunal to decide on questions regarding *status*, arising out of the domestic relations, and the exercise of jurisdiction in such cases, is a matter which pertains *ad statum publicum*—to the public welfare of the whole community. (*Cf. Huber, Jus Hodiernum* IV., 14, § 29). Marriage is not a mere ordinary private contract between the parties. It is a contract creating a *status*, and gives rise to important consequences directly affecting society at large. It lies, indeed, at the root of civilized society. If, then, in a matter of divorce the bare consent of the parties can be held sufficient to give jurisdiction, there is no protection, no safeguard, against the parties acting in *fraudem legis ;* but this, it is the policy, as well as the duty, of every Court of Justice to discourage and prevent. *Huber*, in his *Jus Hodiernum*, l.c. § 21-24, has very justly observed that such a doctrine would lead to endless confusion. I am clearly of opinion, therefore, that the mere consent of the parties in a question involving their matrimonial *status*,

1878
Nov 22 to 30.
December 2.
" 9.
" 10.
" 11.
1879
January 20.

Weatherley vs. Weatherley.

including divorce *a vinculo*, can not give the Court jurisdiction and make its decree legal, where in the absence of such consent, the exercise of jurisdiction and the subsequent decree would be illegal. Nor is there anythi g to prevent the Court, of its own mere motion, raising the question of jurisdiction. Were this not so, the Court would be bound by the neglect or omission of the pleader, who failed to file a proper declinatory exception. Moreover, it may sometimes happen, as in this very case, that, only after the evidence has been part heard, the facts disclosed suggest the question whether or not, under the circumstances, the Court has jurisdiction (cf. *Van Leeuwen*, R. D. Law, 5, 4, § 2, n. 6).

A sentence of divorce pronounced by a competent Court, having jurisdiction of the subject matter, in one country, is, of course, binding on the Courts of all civilized countries. But one of the most difficult and embarrassing questions of private international law is the question—when, and under what circumstances, will the tribunal of a given country, declaring a valid marriage dissolved, have jurisdiction to do so, in order to cause its judgment to be respected and recognised by the Courts of every other country? It is admitted that the Courts of any country, where the parties have their *bona fide* civil domicile, have jurisdiction to dissolve a valid marriage contracted elsewhere. *Story*, *Bishop*, *Burge*, the law in Scotland, and the recent cases of *Shaw* vs. *Gould*, *L. R.* 3, *H. L. Ca.*, and *Wilson* vs. *Wilson*, *L. R.* 2, *P. and D.* 441-2, all agree in this.

It becomes necessary, therefore, to consider whether or not the plaintiff, Colonel Weatherley, (for under the circumstances of this case, the defendant's domicile is that of her husband), is actually domiciled in this country. The facts bearing on this point are the following. The parties were married at Wingfield Church, near Windsor, England, in 1857. From that time, until the commencement of this suit, they cohabited together as man and wife. The petitioner, at the time of his marriage, was a Lieutenant in a cavalry regiment. After their marriage, Colonel and Mrs. Weatherley went to India, and afterwards returned to England. They had a house of their own at Brighton. The plaintiff is a director of the Eersteling Gold Mining Company, formed in England for the purpose of carrying

1878
Nov 22 to 30.
December 2.
" 9.
" 10.
" 11.
1879
January 20.

Weatherley vs. Weatherley.

on operations in the district of Zoutpansberg, in the Transvaal. He left England in 1875 for the Transvaal, chiefly with the view of looking after the affairs of the Company, and partly, also, with the view of economising. The house at Brighton, at the time of their departure for England, still belonged to Colonel Weatherley; and Mrs. Weatherley left remaining in this house her Indian collection, plate, library, and other articles. They arrived in the Transvaal, together with their two sons, Paulet and Rupert, in January, 1876. The Colonel purchased a house in Pretoria, which has, however, since been advertised for sale. For the last three years he has been residing in this territory with his family, but carried on no business or occupation of his own. He has endeavoured to obtain employment in this country in a military capacity, but without success, until recently. After he determined to take proceedings for divorce, he was commissioned by Lord Chelmsford to raise a body of volunteers for service against the Kafirs. These volunteers are to serve under Colonel Weatherley for the period of six months. Colonel Weatherley's intention to return to England is indefinite, and he does not know what he will do at present, except remain here. This is what he says himself: "When I left England, I came here only for a few months. I had not the slightest intention of staying here longer. I hope to go back, but I cannot say when exactly. I have every reason to expect that I shall stay here for some time to come." The petitioner's eldest son, who is eighteen years of age, says: "When my father left England, he came out, I believe, to superintend proceedings at the Eersteling Mine. I believe he also came with the view of economising. I believe my father intends to go back to England as soon as prospects turn out favourably at home." The view that Colonel Weatherley came out partly to economise is supported by the fact that the house at Brighton has since been sold, together with the heavy furniture to pay debts. Mrs. Weatherley has also stated that her husband left England for six months only. She was averse to it at first, but at last consented to accompany her husband to Africa. Colonel Weatherley came out, she states, to look after the affairs of the Mining Company. She repeatedly expressed her

1878
Nov. 22 to 30.
December 2.
" 9.
" 10.
" 11.
1879
January 20,

Weatherley vs. Weatherley.

wish to go back to England, and the Colonel on such occasions always replied that the Secocoeni war had broken out, that he had obtained a concession for the Company from President Burgers, and that when affairs got settled he would be glad to go home himself. In a subsequent portion of her evidence she says: "Circumstance have made us stay longer than I thought we had intended. The war with Secocoeni, the promised concession to the Company, and various little matters made us remain here longer than we otherwise would have done." The plaintiff left for Capetown in May, 1878, on a temporary visit, leaving his wife and sons in Pretoria. While in Capetown, he wrote several letters to the defendant. In a letter dated 16th June, 1878, he writes to Mrs. Weatherley: "Don't buy a mattrass for me, for our movements are uncertain;" and in the same letter, speaking of the high cost of living in the Transvaal, he says: "A thousand a year down here would go as far as three up there. All I want, dear, is our concession, &c., and be off. It is not a country for a lady or a gentleman either."

To give an exhaustive definition of *civil domicile*, which will embrace all cases, is by no means easy; but this is certain that the following two essentials must exist in every instance of an alleged change of domicile—viz.: 1st, actual residence in the new place or country; and 2nd, An intention of remaining there, so as to make it one's permanent home. There must be actual residence *animo manendi* in the new country. *Van Leeuwen*, a very high authority in this Court, has laid it down that a mere temporary change of place, or removal for greater security, or for health, is not sufficient to create an alteration in one's domicile, *sed fixa sedes et deliberatus in eo loco perpetuo habitandi animus requiratur (Cens. For., lib. III., 12, n. 5)*. And *Voet*, an equally high authority, has, in his *Commentary on the Pandects*, expressed himself to the same effect (*Lib.* V., tit. I., *n.* 98). Accordingly *Simon van Groenewegen*, an eminent Dutch lawyer, has observed that if a man leaves his native country for several years, merely to make his fortune in the East Indies, he does not thereby change his domicile of origin *(Consult Adwijs, vol. 6, cons.* 153), and the Dutch *Juris-Consult* elsewhere emphatically says, that

1878
Nov. 22 to 30.
December 2.
" 9.
" 10.
" 11.
1879
January 20.

Weatherley sv. Weatherley.

if there be an intention of returning to the native country, even after the lapse of a thousand years, no new domicile will have been created by the removal or change of residence. *Quia, si habet animum recedendi, etiam per mille annos, non contrahitur domicilium* (*Consult et Adwijs, vol.* 3, *cons.* 138, *n.* 27). Lord Westbury, in the case of *Udny* vs. *Udny* (*L.R.* 1, *H.L. Sc.* 458), said: "Domicile of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time. This is a description of the circumstances which create or constitute a domicile, and not a definition of the term. There must be a residence freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors, or the relief from illness; and it must be a residence fixed, not for a limited period or particular purpose, but general and indefinite in its future contemplation."

In *Udny* vs. *Udny*, a very strong case indeed, the Judge Ordinary and the Court of Session in Scotland held that, under the following circumstances, there had been no change of domicile. Colonel Udny's domicile of origin was Scotch. In 1812 he married, and took a long lease of a house in London, in which he resided with his family until 1844. He made frequent visits to Scotland, but had no residence there. He, at the time thought of completing Udny Castle in Scotland; and was also appointed a magistrate in Scotland, but never acted as such. His choice of England as a residence appears to have been considerably influenced by his taste for the sports of the turf. He, in 1844, was compelled to leave England on account of debts, and went to Boulogne in France, and about the same time sold his house in London. Upon these facts the Scotch Court held that Colonel Udny had never, by his long residence of 32 years in England, changed his domicile of origin. The House of Lords did not enter into this question, for it held that, even if Colonel Udny had acquired a new domicile in England from 1812 to 1844, on his departure from England for Bologne his domicile of origin re-operated. Lord Westbury indeed, expressed an opinion that after his marriage Colonel

1878
Nov. 22 to 30.
December 2.
" 9.
" 10.
" 11.
1879
January 20.

Weatherley vs. Weatherley.

Udny, by making London the place of abode of himself and family, and becoming subject to the municipal duties of a resident, and remaining there for 32 years, had deliberately chosen and acquired an English domicile. But Lord Chelmsford, on the other hand, thought that during the whole of Colonel Udny's long residence in England there was always wanting the intention of making it his permanent home, and that residence alone, however long, was wholly immaterial unless coupled with such intention.

The evidence in this case clearly establishes that Colonel Weatherley left England with no intention of settling down in the Transvaal, or of making this country his fixed and permanent home. Does there then exist anything to shew that his original intention of remaining here only for a time has, since his arrival in the country, become changed into a fixed intention of remaining here permanently—of making the Transvaal his home? I think not. The fact that he has been residing here three years and has bought a house, since advertised for sale, *per se* proves nothing, for mere length of residence does not constitute a change of domicile, nor is the abandonment of the domicile of origin for a new domicile of choice easily presumed. It is true, the Colonel at one time endeavored to obtain military employ here, but in this he failed. His letters to his wife, written from Capetown, shew that he also hoped to get military employment in the Cape Colony, but without success. He is recruiting volunteers, but only to serve for the limited period of six months. His residence in the Transvaal for three years, instead of six months, is explained by a variety of circumstances, viz., change of Government; the war with the Kafir Chief Secocoeni; the unsettled state of the country, where the Eersteling Gold Mining Company, whose representative Colonel Weatherley is, carried on their operations; the promised concession; pecuniary difficulties; and the like. He has frequently told Mrs. Weatherley that when affairs got settled he would be glad to go home; and in the letter of 16th June, written before any proceedings for divorce were thought of, and consequently entitled to considerable weight, the Colonel writes to Mrs. Weatherley his movements are uncertain, and all he wants is "our concession and be off"—*i.e.*, to depart from the country. It seems to

me from this evidence that circumstances have made Colonel Weatherley remain in this territory longer than he originally intended; that it is not his desire to make this his home or to settle down here, and although he is at present obliged to remain in the country, there exists the *animus revertendi* to be carried out as soon as a suitable opportunity offers. I can come to no other conclusion, therefore, than that Colonel Weatherley has not abandoned his English domicile of origin, in will and in deed, for a new domicile of choice, freely and voluntarily chosen, in the Transvaal. I have gone into this question of domicile at some length in order to bring out more prominently what I have yet to say with reference to the matter of jurisdiction.

Having come to the conclusion that Colonel Weatherley has not, by his removal from England to the Transvaal, abandoned his domicile of origin, and acquired a new domicile of choice *(stricto sensu)* here, the question suggests itself whether, upon this finding, the Court has, notwithstanding, jurisdiction to entertain the present suit for divorce *a vinculo matrimonii*, contracted in England by parties who are still domiciled English subjects? The lawyers of the Dutch school have not, so far as I have been able to consult them, given much attention to the precise question, upon what principle Courts of Justice ought to act when decreeing the dissolution of a foreign marriage. *Story* and *Burge*, indeed, broadly state that none of the Jurists of continental Europe have treated of this all-important matter; and it is only in Scotland, England, and America where the subject has undergone full and elaborate discussion. In England, the doctrine was laid down by the House of Lords in *Lolly's* case (A.D. 1812), followed by Lord Brougham in *McCarthy* vs. *Decaix* (1831), that a foreign tribunal could not dissolve an English marriage, although the parties to it were at the time actually domiciled within the foreign country. Lord Brougham, himself, subsequently modified his views, and this doctrine now no longer obtains in England. Later, and more recent, decisions have restricted the judgment in *Lolly's* case to the particular facts thereof, and have established the position that the Courts of a foreign country have power to dissolve a marriage contracted in England between English subjects,

1878
Nov. 23 to 30.
December 2.
" 9.
" 10.
" 11.
1879
January 20.

Weatherley vs. Weatherley.

provided the parties were at the time actually and *bona fide* domiciled in such foreign country. (*Shaw* vs. *Gould*, *L. R.* 3, *H. L. Ca.* 55. *Shaw* vs. *Attorney-General*, *L. R.* 2 *P. and D.* 162. *Wilson* vs. *Wilson*, *L. R.* 2, *P. D.* 442. *Niboyet* vs. *Niboyet*, *L. R.* 3, *P. Div.* 57). But it is impossible to read the judgments in these very cases, and especially that in *Le Sueur* vs. *Le Sueur*, *L. R.*, *I. P. Div.* 142, where several authorities were reviewed, without entertaining a very strong doubt whether the Court in England, although the parties are only temporary, yet *bona fide* residents, and not actually domiciled there, would not dissolve the foreign marriage, on the ground of adultery committed by the wife in England. These authorities clearly show that, in more than one instance, the Court of Divorce in England has dissolved foreign marriages, where the parties were not at the time actually domiciled in England; whereas, in other and similar instances, the Court has refused to exercise its jurisdiction. Hence, Lord Penzance, in 1872, remarked, "It is not disputed that if the petitioner was domiciled in England, at the time this suit was commenced, this Court has jurisdiction; but whether any residence in this country, short of domicile, using that word in its ordinary sense, will give the Court jurisdiction over parties whose domicile is elsewhere, is a question upon which the authorities are not consistent." (*Wilson* vs. *Wilson ubi supra* 441.) And Sir R. Phillimore, as recently as May last, in referring to this passage, says, "I am afraid this statement is correct." (*L. R.* 3, *P. Div.* 59, *Cf.* per *Lord Chelmsford*, *L. R.* 3, *H. L. Ca. P.* 76). The law, therefore, in England, cannot be said to be definitely settled as to the question whether a *bona fide* temporary residence, short of actual domicile, is sufficient to give the English Court jurisdiction to decree a dissolution of a foreign marriage.* But, *è converso*, the law in England seems now settled that, under similar circumstances, a foreign tribunal is not competent to decree a divorce of an English marriage, *at least for English purposes*. The law in the United States of America is, that actual domicile alone gives the Courts jurisdiction to decree a dissolution of a foreign marriage. *Story, Conflict of Laws*, § 230*a*. *Bishop*, vol. II., § 141, 4th ed.

* Cf. *Niboyet* vs. *Niboyet*, in appeal *L.R.* 4, *P. D.* 1.—Ed.

1878
Nov. 29 to 30.
December 2.
" 9.
" 10.
" 11.
1879
January 20.

Weatherley vs. Weatherley.

I have gone into this examination of the law of England, because it was boldly contended that by the law of that country this Court has no jurisdiction to dissolve an English marriage between domiciled English subjects. The decisions in England have, it is true, laid down that for English purposes, under these circumstances, the decree of this Court dissolving the marriage cannot be recognised; but that is a very different position from the argument of counsel, that this Court has absolutely no jurisdiction at all to entertain the present suit. Such a contention claims for the English case law, which is virtually a foreign law, too extensive an extra-territorial effect. The English Law can only receive recognition here *per comitatem*, and not *stricti juris (cf. V. d. Keesel, Th.* 32–34). A judgment of Chief Justice Gibson, to be found in *Story, Conflict of Laws*, § 205, *in notis*, was also cited, with the view or showing that this Court has no jurisdiction. But the learned Chief Justice, in his sweeping denunciation of the doctrine prevailing in Scotland, is mistaken in the view he has adopted of the grounds upon which the exercise of jurisdiction in Scotland in cases of divorce is founded. In like manner his opinion that the *lex loci contractus* may, or does, affect the question of jurisdiction, is an exploded notion. So, again, he is in error when he says that the rule of English law, which holds that the exercise of jurisdiction can only be had by the Courts of the actual domicile, is founded on the doctrine of perpetual allegiance. The doctrine of perpetual allegiance has nothing to do with change of domicile. Thus, an Englishman, who has left his native country to settle in one of our colonies, or elsewhere, changes his domicile, but there is no corresponding change of allegiance. He still remains a subject of the Queen, and owes allegiance to the Crown.

In Scotland, however, there exists no doubt, or difficulty, on the subject. By the law of that country, which (as I shall show hereafter) is more analogous to the Roman Dutch Law, it has been laid down, by a uniform series of decisions, that the Scotch Courts have jurisdiction, on proof of a just cause of divorce, to dissolve a marriage contracted in England, or any other foreign country, and they will sustain process of divorce to that effect, provided merely that such a domicile has been acquired in Scotland by the defendant

1878
Nov. 22 to 30.
December 2.
" 9.
" 10.
" 11.
1879
January 20.

Weatherley vs. Weatherley.

as would be sufficient to found ordinary civil jurisdiction, viz., a simple residence of 40 days. (*Erskine, Inst. Bk.*, I., tit. 2, § 20, *in notis.*) A forty days' residence in Scotland excludes all consideration of foreign domicile. A citation served on the defendant at his dwelling place, after a residence of 40 days, is good and legal, but if the citation be served personally on the defender, no residence of 40 days is necessary. It is to be pointed out here that *domicile of jurisdiction* merely means a residence of 40 days, whether *animo manendi*, or not, is immaterial; and the distinction between it and *civil domicile, i.e.*, permanent residence, *animo manendi*, must not be lost sight of in discussing the question of jurisdiction.

The doctrine in Scotland is based on the right of the Scotch Court to redress any personal wrong, including therefore the delictum of adultery, committed by a defendant within the territory of Scotland; whereas the English doctrine which refuses to recognise the power of foreign tribunals to decree a dissolution of a marriage between English subjects who have no civil domicile *(stricto sensu)* in the foreign country, is founded upon the principle that divorce is a question of status, and can only be decreed by the Courts of the place of domicile, for no nation is bound to recognise the judgment of a foreign tribunal in dissolving a marriage subsisting between its own domiciled subjects, temporarily absent abroad. By so doing the foreign tribunal interferes with the jurisdiction *legis domesticæ*, and this no independent nation, like England, can be expected to tolerate.

A difference of opinion and principle on this subject leads to the most serious consequences. If I were to hold that this Court has jurisdiction, and were to decree a divorce, the Courts in England may ignore my decree altogether. Suppose now that Colonel Weatherley, and in like manner, Mrs. Weatherley, were to enter into a second marriage, and that in each case issue is born of the second marriage; this second marriage would be valid, and the issue legitimate in the Transvaal, in Scotland, and perhaps in other countries, whereas by English law, the second marriage would be invalid, the issue thereof bastard, and Colonel and Mrs. Weatherley would be guilty of bigamy, and punishable as

felons.* In the absence of any uniform rule, the Court must lay down a principle and give a decision, and is, moreover, bound to state the reasons upon which it professes to act. When judges and lawyers of recognized eminence and reputation have, with great learning and ability, expressed different views on the subject, it behoves one, in the language of a learned commentator, to tread both reverently and cautiously, and I, therefore, approach the question with some diffidence. *Huber*, in his *Prælectiones*, vol. II. *de conflictu legum*, § 2, has laid it down as an axiom that all persons, who are actually within the territory of a given State, whether permanently or only for a temporary purpose, are subject to its laws and the jurisdiction of its courts. No doubt a mere temporary subject, *subditus temporanius* as *Voet (de status n.* 5) terms it, is not liable to certain portions of the laws, which are alone applicable to domiciled subjects. Thus domiciled subjects *(stricto sensu)* are liable to the discharge of public duties, the payment of taxes, and also exercise certain municipal rights and privileges, from which he, who is merely a temporary resident, or visitor, is excluded; and this, it seems to me, is the meaning of *Van der Keessel*, in *Thesis* 30, so much pressed upon me by counsel for the defendant. But a temporary subject is amenable to the Court, not merely in the case of crime, but also for every delict or wrongful act committed by him within its jurisdiction. *Bynkershoek, de foro legatorum, cap.* 3, to which, at the conclusion of the argument, my attention was drawn, also adopts this view. He says, that a mere temporary or casual visitor to Holland does not establish a forum in that country for all purposes, *quia advena est, non subditus;* that is to say, not a domiciled subject, although he would come under the jurisdiction of the Courts of Holland *delicti causâ*. A temporary resident, therefore, would be liable for defamation, ordinary trespass, seduction, and the like, committed by him in the foreign territory. In these instances the Court of the place, where the wrong is committed, has power to give redress to the injured party; why, then, should the Court not have jurisdiction also to redress a matrimonial wrong, viz., adultery? Those, who answer this question in the negative, maintain

1878.
Nov. 22 to 30.
December 2.
" 9.
" 10.
" 11.
1879.
January 20.

Weatherley vs. Weatherley.

* Cf. the recent case of *Briggs* vs. *Briggs*, *L. R.* 5, *P. D.* 163.—Ed.

1878.
Nov. 22 to 30.
December 2.
" 9.
" 10.
" 11.
1879.
January 20.

Weatherley v. Weatherley.

that divorce is a matter of *status*, and must be referred to the *lex domicilii* of the parties. Thus, Lord Westbury, in *Shaw* vs. *Gould* (*L. R.* 3, *H. L.* 83,) observes, "Questions of personal status depend on the law of the actual domicile. It is said by a foreign jurist of authority—Rodenburg—and his works are cited with approbation by many recent writers, *Unicum hoc ipsa rei natura ac necessitas invexit ut cum de statu et conditione hominum quæritur, solum modo judici, et quidem domicilii, universum in illa jus sit attributum.* This position that *universum jus*, that is, jurisdiction which is complete, and ought to be everywhere recognised, does in all matters, touching the personal *status* or condition of persons, belong to the judge of that country where the persons are domiciled, has been generally recognized." But it may be said, in answer to this, that it has not been generally recognised that jurisdiction belongs exclusively in all matters of *status* to the judge of the actual domicile alone *for all purposes*. Scotch judges and lawyers have adopted a different view, and John Voet distinctly controverts the doctrine of Rodenburg. In his commentary *ad Pandectas*, lib. 1, *de Statutis*, No. 8, after quoting the above passage from Rodenburg, he says *sed quæ illa fuerit rei natura, quæ necessitas satis urgens nec dum licuit animadvertere.* Rodenburg argues that, in matters affecting the status of an individual, we should apply the law of one fixed place, viz., of the domicile; for it would be absurd that a person should undergo a change of status in every country he might happen to visit or pass through: *e.g.*, that a party should be *sui juris*, or a wife *in potestate*, or a prodigal, in one place, and *alieni juris, extra potestatem*, and *frugus* in another place. This argument is said to be founded on convenience, and the rule may now be taken to be that the personal status of a party, as defined by the law of his domicile, whether of origin or habitation, follows the person, like his shadow, everywhere. (*Cf. Van der Keessel, Th.* 42.) But what is the precise extent or scope of this rule? Does it indiscriminately apply to all matters of status for all purposes? It may be sound and reasonable to lay down that a person, who is a minor or prodigal by the law of his domicile, should be so considered even in a foreign country, as regards transactions entered

1878.
Nov. 22 to 30.
December 2.
" 9.
" 10.
" 11.
1879.

Weatherley vs. Weatherley.

into by him there. It may be that a married woman, who is considered as a minor by the law of her domicile, should be considered a minor in every other country. But then the law of the foreign country relating to minors and prodigals, where the transactions takes place and comes into question, is to be resorted to, and not the *lex domicilii*. (*Cf. Huber, Prælectiones* vol. II., *de conflictu legum* §§ 12, 15). On the other hand, the contract of marriage, which creates the status of husband and wife, depends for its validity on the law of the place where the marriage is celebrated, which is often not the law of the domicile. Here, then, the question whether the parties to the contract of marriage are husband and wife—a question of personal status in the strictest sense of the word—is determined by the *lex loci contractus*, and not by the law of the domicile of the parties. It may very fairly be doubted whether the doctrine of Rodenburg, which professes to be founded on convenience and expediency does not admit of a limitation. It may very fairly be doubted whether the rule can be extended so as to exclude a foreign tribunal from exercising its jurisdiction in matrimonial matters over persons, who, although domiciled elsewhere, are nevertheless *bona fide* resident within the foreign country. The foreign law of England can in this case only be allowed to hav effect in this territory, in so far as it does not interfere with our law and the authority of our Courts, or with the rights of our citizens, with good government, and public utility. "*Rectores imperiorum id comiter agunt, ut jura cujusque populi intra terminos ejus exercita, teneant ubique suam vim, quatenus nihil potestati aut juri alterius imperantis ejusque civium præjudicetur.*" (*Huber, Prælectiones*, vol. 2, *de conflictu legum* § 2). It is, moreover, the province of this Court alone, and not of the foreign tribunal, to lay down what is the law applicable to the case before it, and what is most in accord with good government, justice, or public convenience in the Transvaal. Mr. Burge, who also contends that the Court of the domicile is the only competent tribunal to decree a divorce, says in support of this view:—"A State has no interest in, nor does it profess to regulate the con itions of, those who are to all intents and purposes foreigners, except so far as by their acts or conduct, or in respect of

1878
Nov. 22 to 30.
December 2.
" 9.
" 10.
" 11.
1879
January 20.

Weatherley vs. Weatherley.

their property, they become the objects of her laws. . . . . It is perfectly reasonable, and the interests of the civilized world require, that the tribunals of every country should entertain questions of contract between persons who are only its transient visitors, but there is no reason for applying to the determination of the incidents and qualities of their status, a law which never professed to regulate it, which they never contemplated, and to which they have no intention by any future residence of conforming." (*Com. on Foreign and Colonial Law*, vol. 1, p. 689-690). It is difficult to see the force of this reasoning. Burge, in the first place, assumes that a State has no interest to regulate the condition of those who are not its domiciled subjects. This may be true as regards wrongs affecting the condition or status committed outside the territory of the foreign State, and beyond the jurisdiction of the foreign tribunal, but there it stops. Burge himself admits that every State may deal with those who are to all intents and purposes foreigners, so far as by their acts and conduct they become the object of her laws. A foreigner, therefore, may be liable to the laws of such State, *ex contractu* and *ex delicto;* but where he is guilty of adultery, an act which by the law of the State within whose jurisdiction he temporarily resides, is a delictum, and considered a violation of the marriage relation, has the State no interest to interfere? Is it not its duty to protect the innocent party, and to guard over the public morals by regulating the conduct of all those persons who are within its jurisdiction? Is the foreign tribunal to take no cognizance of such acts on the part of its own domiciled subjects, but remain idle and allow a violation, or any number of violations, of the marriage relation, as viewed by the light of his own laws in such a case, simply because the parties happened to be domiciled elsewhere? Is it to decline to give redress merely because if it did the tribunal of the *locus domicilii* would ignore such interference? It seems to me that by so doing the tribunal of such State would silently be encouraging acts of open adultery, instead of upholding the sanctity and purity of the marriage tie. Is it any answer to say, as Burge does, but this is a question of status to which it is proposed to apply a law which the parties, when they entered into the

marriage contract creating the status, never contemplated, and which law is different from that of their domicile? Surely the private contemplation of the parties cannot be expected to override or control what the law of the foreign State may deem best suited to good government, public morality, and the peace of families within its territory?

In like manner, Bishop, a learned American writer, denies that the Scotch doctrine is founded on expediency, and advocates the adoption of the principle that the Courts of the parties' actual domicile alone can dissolve the marriage tie subsisting between them. He maintains that marriage is an institution universally favoured by all civilized nations, and, hence the rule that a marriage valid by the law of the place of celebration is valid everywhere else; whereas, on the other hand, divorce is the opposite of marriage—it is the undoing of what policy demands should be done, and, though the laws of all countries ought to allow divorce for certain causes, the law of the parties' domicile should not, in this respect, be ignored by the foreign tribunal. (*Com., Marriage and Divorce*, vol. II., ch. X., § 138.) Now it is admitted there should be a divorce for certain reasons, and there exists, indeed, no obstacle to prevent the innocent party from obtaining redress, if he be so minded, from the Court of his domicile, for adultery committed in a foreign country; but why should he be compelled to resort to it alone? It may be a sound position to lay down that the Courts of the parties' domicile cannot be expected to recognise a divorce decreed in a foreign country, upon grounds which the *lex domicilii* does not consider sufficient for the dissolution of a marriage. Thus, if a foreign tribunal, in accordance with its own law, decreed a divorce of an English marriage subsisting between English subjects, only resident at the time in the foreign country, on the ground of habitual drunkenness, incompatibility of temper, a criminal conviction, and sentence of long imprisonment, and the like; the Courts in England may feel themselves justified in refusing to recognise a divorce so obtained, because it is contrary to the policy of their marriage laws. Again, in the Transvaal, simple adultery by the husband, not coupled with cruelty, or desertion, is a good ground of divorce *a vinculo*,

1878
Nov 22 to 30.
December 2.
" 9.
" 10.
" 11.
1879
January 20.

Weatherley vs. Weatherley.

but not so in England. If, now, a domiciled Englishman, merely resident here, commits adultery and this Court decrees a divorce, the tribunals in England, the *locus domicilii*, may feel called upon to ignore its decree. But that is a matter for their consideration, and furnishes no argument whatever against the exercise of jurisdiction by this Court when acts are committed within this territory, which, by the law here, constitute good grounds for divorce.

The principle that the Courts of the parties' actual domicile *alone* can dissolve the marriage tie subsisting between them seems to me entirely inexpedient, and may lead to positive injustice. Expediency is altogether against such a rigid doctrine. Let me put a few examples. Suppose an English gentleman is appointed Civil Governor of a Colony, say for five years, or is appointed a Special Commissioner to investigate certain matters in the Colony. He leaves England, where he has his domicile, with his wife and family, and takes up his residence in the Colony. While there, his wife commits adultery. Now the rule, which the learned persons I have mentioned contend for, would effectually deprive the innocent husband of redress at the hands of the tribunal within whose territory the commission of adultery took place. Take another instance. An English engineer is employed by a company to construct a line of railway, or open a mine in the Transvaal. He brings out his wife and family with him to this country, where he will probably remain for a few years. Under these circumstances the domicile is still English. The husband commits adultery and deserts his wife, is now this Court precluded from affording protection and redress to the innocent wife because, although the adultery was commited here, her domicile is in England, she being only a temporary resident in the Transvaal? Would the refusal of the Court to exercise jurisdiction not be a denial of justice to her? Is she to be compelled to seek relief in a Court 6,000 or 7,000 miles away from the place where the wrong was committed, and all the witnesses reside? It may often, under such circumstances, be practically impossible for her to proceed to England without pecuniary assistance from her husband, which she is not likely to obtain. Or suppose that in all these instances the wife commits adultery, is the husband

1878
Nov. 23 to 30.
December 2.
" 9.
" 10.
" 11.
1879
January 20.

Weatherley vs. Weatherley.

to wait until his return to England before he can hope to be released from a bond uniting him to an adulteress? Pursue this matter a little further, and suppose that the Governor, or the Special Commissioner, is ordered to another colony, or the engineer is obliged to accept a fresh engagement in some other place, what is each of them to do with his guilty wife? Must each of them wait till he returns to the country of his domicile before instituting proceedings, when probably the witnesses to testify to her adultery are all dead? The constant and increasing intercourse going on between England and her colonies, which are to a great extent, for purposes of jurisdiction, foreign countries, will suggest numerous other examples, and it seems to me that a strict adherence to the doctrine, which excludes the exercise of jurisdiction on the part of the tribunal of the place where the adultery is committed, and entirely confines it to the tribunal of the actual domicile, is productive of much delay and expense, inconvenience, and injustice. I cannot help thinking that Rodenburg never intended that the rule he laid down on the ground of convenience should receive the extensive and exclutive application which some lawyers have given to it. The rule is supposed to be based on convenience, and as soon, therefore, as it ceases to be convenient by causing positive inconvenience, it ought no longer to apply. *Cessante ratione legis cessat lex ipsa.*

Sir Robert Phillimore, in his *International Law,* says that "Savigny lays it down as an incontrovertible proposition that the only competent forum is that of the *actual* domicile of the husband, and the only law to be applied that of his domicile. His opinion is founded on considerations of the moral element of laws relating to divorce, which clothes them with a rigorous and positive character; he considers them as belonging to that class of laws which appertain to the public policy of each State; laws, therefore, which each State enacts without regard to other States." (Vol. IV., ch. 21, § 96.) Sir Robert Phillimore does not tell us what is here meant by *actual* domicile, and I very much regret that I have not the text of Savigny before me. This, however, is certain, actual domicile means either the actual place of residence of the husband at the time of the suit, or it means actual domicile (*stricto sensu*) as used in the rule of Roden-

1878
Nov. 28 to 30.
December 2.
" 9.
" 10.
" 11.
1879.
January 20.

Weatherley vs. Weatherley.

burg, and such, as I have come to the conclusion, Colonel Weatherley does not possess in the Transvaal. If the former be the correct meaning, Savigny is a direct authority against Rodenburg, and is in favour of the exercise of jurisdiction by this Court; and if the latter be the correct interpretation, then the reasoning of Savigny will apply with equal force in favor of the assumption and exercise of jurisdiction by this Court, for it is precisely because of the existence of the moral element in a question of divorce, and the demands of public policy, that the Court of the place where the adultery is committed, and the parties reside, ought to entertain the suit.

The present case comes to this. An English gentleman and his wife are temporary residents in the Transvaal. The Court of this country recognises their status of husband and wife. It will compel them to fulfil and observe towards each other all the duties to which the relation they occupy gives rise. It will recognise the authority of the father over the children of the marriage, and is bound to redress all wrongs and injuries peculiar to the marriage relation committed within the limits of the territory over which its jurisdiction extends. If the husband ill-treats his wife, refuses her support, or deserts her, she has a right to seek redress from this Court, within whose jurisdiction she and her husband reside, and where the wrong is committed. This Court may entertain a suit for restitution of conjugal rights at the instance of either the husband or the wife. Why may it not then decree a divorce *a vinculo* on the ground of adultery? Where is the law which forbids it? Where is the law which says—you shall recognise the relation of husband and wife, but shall forbear to take cognizance of and redress wrongs committed in violation of the marriage relation within your jurisdiction?

An eminent Scotch Judge, Lord Meadowbank, thus expresses himself, "If the law refused to apply its rules to the relation of husband and wife, parent and child, master and servant, among foreigners in this country, Scotland could not be deemed a civilized country; as thereby it would permit a numerous description of persons to traverse it, and violate with utter impunity all the obligations on which the principal comforts of domestic life depend. If it assumed

jurisdiction in such cases but applied not its own rules, but the rules of the law of the foreign country where the relation has been created, the supremacy of the law of Scotland within its own territories would be compromised, its arrangements for domestic comfort violated, confounded, and perplexed, and powers of foreign Courts, unknown to our law and constitution, usurped and exercised. . . . . If not found in person to receive a citation, a domicile is of consequence, but it is of no consequence in such a case, if the foreigner be cited in person, or his residence is sufficiently ascertained. The *animus remanendi* may be of great consequence to establish the presumption on which the distribution of succession in movables is supposed to depend; but it does not seem to enter into the constitution of a domicile for citation by 40 days' residence, nor form any requisite for the validity of a personal citation to an action in obtaining redress of civil wrongs more than for punishment of a crime, nor can these suits for redress, which involve *quæstiones status*, admit of any different consideration. In all cases where the status claimed or decerned is *juris gentium*, the competency of trying such wherever the person concerned is found, is obviously necessary. *The domestic relations concern so much the most immediate comforts of life, and the well-being of society, that, where the parties concerned are present, it is impossible to leave to the Greek calends, as the interlocutor complained of does, the trying of them, without incurring the obloquy of a denegatio justitiæ.*" (*Bishop, Marriage and Divorce*, vol. 2, § 150, 4th edn.) More recently, another eminent judge, Lord Colonsay, spoke in the House of Lords as follows:—"It was said that a foreign Court has no jurisdiction in the matter of divorce, unless the parties are domiciled in that country; but what is meant by *domicile?* I observe that it is designated sometimes as a *bona fide* domicile, sometimes as a *real* domicile, sometimes as a domicile *for all purposes*. But I must with deference hesitate to hold that on general principles of jurisprudence or rules of international law, the jurisdiction to redress matrimonial wrongs, including the granting of a decree *a vinculo*, depends on there being a domicile such as seems to be implied in some of these expressions. Jurisdiction to redress wrongs in regard to domestic relations, does not

1878
Nov 22 to 30.
December 2.
" 9.
" 10.
" 11.
1879
January 20

Weatherley vs. Weatherley.

necessarily depend on domicile for all purposes. If the decisions to which I have referred proceeded on the ground that the resort to the foreign country was merely for the temporary purpose of giving to the courts of that country the opportunity of dealing with the case according to their own law, and thereby obtaining a dissolution of the marriage, and that such was the object of both parties, these decisions might be said to derive support from principles of general law on the ground of being *in fraudem legis*. But if you put the case of parties resorting to Scotland with no such view, and being resident there for a considerable time, though not so as to change the domicile for all purposes, and then suppose that the wife commits adultery in Scotland, and that the husband discovers it, and immediately raises an action of divorce in the Court in Scotland, where the witnesses reside, and where his own duties detain him, and that he proves his case and obtains a decree, which decree is unquestionably good in Scotland, and would, I believe, be recognised in most other countries, I am slow to think that it would be ignored in England because it had not been pronounced by the Divorce Court here. How would the Court of Divorce here deal with the converse case?" (*Shaw* vs. *Gould L. R.* 3, *H. L.* 95). That the English Divorce Court has sometimes in the converse case assumed jurisdiction has already been pointed out.

The observations of the two learned judges just mentioned are entitled to the greatest weight; indeed their arguments seem altogether unanswerable. Our law of domestic relations, our *jus familiare*, is far more analogous to the jurisprudence of Scotland than to the law of England on the same subject. Thus, by Roman-Dutch and Scotch law, a divorce *a vinculo* is granted for either of the two causes of adultery and malicious desertion, whether committed by the husband or the wife. In England, on the other hand, desertion is only ground for separation *a mensâ et thoro;* and the simple adultery of the husband, unaccompanied by cruelty or desertion, is not a sufficient cause for a divorce *a vinculo*. In like manner, by our law, and that of Scotland, children born before marriage may be legitimated by the subsequent marriage of their parents; but the English law emphatically holds that an

1878
Nov. 22 to 30
December 2.
" 9.
" 10.
" 11.
1879.
January 20

Westtherley vs Westtherley.

antenatus continues bastard even after the marriage of his parents. I am not aware of any Roman Dutch decision expressly deciding this question of jurisdiction over parties not actually domiciled in case of divorce; nor am I aware that the precise point is treated of by any Roman-Dutch commentator, although many Dutch jurists have laid down general rules or principles with regard to questions of status. Hence, if this be an instance of a *casus omissus*, I should adopt the law of that country whose jurisprudence is most analogous to our own; *(cf. Van der Linden* I. 1, § 4,) more especially if the law of that country is founded in expediency and justice.

Much stress was laid by counsel for the petitioner on the decision in *Newberry* vs. *Newberry*, cited by Mr. Justice Cloete, then still at the bar, in his argument in *Reeves* vs. *Reeves*, 1 *Menz. Rep.* 248. In *Newberry* vs. *Newberry*, the old Court of Justice at the Cape of Good Hope dissolved an English marriage on the ground of adultery committed at sea, although the parties merely touched at the Cape as passengers, in the course of their voyage to England. I have no full report of the case before me, nor do I believe that it has ever been reported. At any rate, I am not prepared to accept this decision as binding on me, and I must observe here that the delictum of adultery in that instance was committed beyond the limits of the Cape Colony. I cannot adopt the view of those lawyers who say that the *loeus delicti* is immaterial as regards the question of jurisdiction. It may be immaterial as regards the exercise of jurisdiction by the Court of the domicile, for such Court would have jurisdiction although the adultery was committed abroad; but in my humble judgment the *locus delicti* is a most material element in the question of jurisdiction by a tribunal, within whose territory the parties temporarily reside. "I put my opinion (said the Lord Chief Clerk) upon the broad ground that this party having left his wife in Scotland, finds that in his absence, she, resident in Scotland, has committed adultery in this country; and I hold that the husband has the undoubted right to proceed against her, in such a state of facts, in the Courts of this country; and I lay aside all consideration of his alleged domicile in America, as wholly immaterial; nor do I think his right could be ex-

1878
Nov. 22 to 30.
December 2.
" 9.
" 10.
" 11.
1879
January 20.

Weatherley vs. Weatherley.

cluded, although he might, by reason of such domicile, have proceeded against her in New York. The fact that she is in Scotland, and has committed adultery here, gives the husband in this case right to prosecute for the dissolution of the Scotch marriage. (*Bishop, Marriage and Divorce,* vol. 2, § 149, 4th ed.)

During the course of the argument it was said that whatever the principle of general law applicable to jurisdiction in case of divorce might be, this Court was bound by the Proclamation of 18th May, 1877, duly confirmed by Her Majesty in Council. The Proclamation establishing this Court certainly provides that the Court shall have jurisdiction over all Her Majesty's subjects and other persons actually within this territory in any suit or proceeding, whether civil, criminal, or mixed. And although it is true that in construing this Proclamation the Court will give an extensive interpretation to it, still, on the other hand, the provisions of the Proclamation cannot receive an interpretation which would violate any well recognised principle of international or general jurisprudence. Nor should it be forgotten that the Court was established for the purpose of administrating the existing law of this country, and if our jurisprudence distinctly forbids the exercise of jurisdiction in this case,which, however, it does not, it is clear that the terms of the Proclamation cannot be allowed to over-ride it.

Again it was maintained that the Court had jurisdiction, and was bound to exercise it according to *Van Leeuwen Roman-Dutch Law,* bk. V., ch. 6, § 1.) But in this passage the learned commentator is speaking of jurisdiction over persons actually domiciled within a certain country, and who must be cited before the local tribunal of the particular place in that country where they have their fixed abode. He is discussing the jurisdiction of the inferior Courts of the defendant's ordinary daily judge. The passage has no application to the circumstances of this case.

Upon the whole, then, I have come to the conclusion that this Court has jurisdiction, for the following reasons, viz.: —1st. Upon the general ground that, by Roman Dutch law, the Court has power to take cognizance of any wrong or delict committed within this territory by persons having an actual *bona fide* residence here at the time, it being im-

material whether such residence amounts to a *domicilium* or not, and to apply the suitable remedy thereto. 2nd. Upon the ground that sound policy, expediency, and justice demand that jurisdiction should be assumed. 3rd. Upon the ground that the law of Scotland, which is most analogous to the Roman Dutch law, favours the assumption and exercise of jurisdiction under the circumstances of this case.

There are, however, certain special features in this case, connected with the question of jurisdiction, which must not be lost sight of. The petitioner and respondent have had a *bona fide* residence of three years in this country. This is, as it were, a middle case. If, on the one hand, the parties are not domiciled here, on the other hand they are not mere casual travellers, here to-day and there to-morrow. They have not repaired to this country with the view of giving this Court jurisdiction *in fraudem legis domicilii*. The adultery, if any, was committed here, and the respondent has been personally served with the summons, and has entered appearance. The adultery of the wife is recognised in all Protestant countries, including England (*the locus domicilii*), as a valid cause of dissolution *a vinculo matrimonii*. The Courts in England, therefore, cannot say, if I were to grant a decree dissolving the marriage, that the dissolution is grounded on a cause of divorce which, in England, is considered *contra bonos mores*, and at variance with the policy of its marriage laws. But these circumstances are, properly speaking, rather matters for the consideration of the Courts in England than for this Court. So long as different countries have different laws of divorce, so long will inconvenient consequences be the result.

[His Lordship then reviewed the evidence, which was very voluminous, and found that the charge of adultery, as laid in the summons, had been fully proved.]

I proceed to consider the special defences that have been set up, and first as to the plea of connivance. It was argued that Colonel Weatherley, when he introduced Gunn into his house, had his doubts about him. When the Colonel left for Capetown on the 11th May last, he knew that Gunn had carried on an improper intercourse with the coloured servant girl Malattie, and, notwithstanding this, he asked Gunn to take care of his wife during his absence. From Capetown

1878
Nov. 22 to 30.
December 2.
" 9.
" 10.
" 11.
1879
January 20.

Weatherley vs. Weatherley.

the Colonel did not write to Mrs. Weatherley that he had discovered that Gunn was an impostor; on the contrary, he sent her a telegram, and subsequently a letter, approving of her conduct in having stood by Gunn during his preliminary examination; and on his return, after having been told by his sons what had taken place, he took no active steps to prevent Gunn from continuing his visits at the house. These facts, it was contended, established the plea of connivance. Now, connivance means where the plaintiff, by his acts and conduct, has either knowingly brought about, or conduced to the adultery of his wife; or where he has so neglected and exposed her to temptation, as, under the circumstances of the case, he ought to have foreseen would, if the opportunity offered, terminate in her fall. Here, then, if the wife commits adultery, he will be taken to have acquiesced in it, and, upon the principle *volenti non fit injuria*, he is the author of his own dishonour. So where the plaintiff, having become aware of an improper intimacy existing between his wife and the co-respondent, remains passive and permits the intimacy to continue, taking no steps to protect his wife and to avert the coming danger, he will be held to have connived at, or consented to, her subsequent adultery. There must, therefore, be a corrupt intention proved on the part of the plaintiff, otherwise he will not be debarred from obtaining a decree. Does the evidence shew the existence of such intention on the part of Colonel Weatherley? It is true that when he first made Gunn's acquaintance he had heard several rumours about him, but the Colonel, who is a man of a trusting nature, paid no great attention to them, and became very intimate with Gunn. He also, at the time of his departure from Pretoria for Capetown, was aware that Gunn had kept up an illicit connection with Malattie; but because, with full knowledge of this, he requested Gunn to look after Mrs. Weatherley, it can not be fairly said that the Colonel must be taken to have foreseen that Gunn would seduce his wife. If so, then no man can venture to leave his wife for a short while, and with safety request an intimate friend to take care of her during his absence. The age of the defendant should also not be lost sight of. Mrs. Weatherley is no longer a young woman, she is 45 years of age and a grandmother. Had she been

1878
Nov. 22 to 30.
December 2.
" 9.
" 10.
" 11.
1879
January 20.

Weatherley vs. Weatherley.

twenty years younger, there may have been some weight in the argument that Colonel Weatherley ought to have been a little more cautious; but even then, can it with justice be contended that mere carelessness of this sort should impose upon the husband the serious punishment of being joined to an adulterous wife for the rest of his life? When in Capetown, the Colonel wrote to Mrs. Weatherley that Gunn had never been a Captain in the Hussars, but a Lieutenant in the 45th Regiment. And he also sent her the telegram approving of her conduct in not going down to Capetown, because he believed that Gunn was being persecuted, and admired her for having stood by him in the hour of trouble, especially as Gunn's arrest was so closely connected with the petition he had sent down praying for the appointment of Colonel Weatherley as Administrator of the Transvaal. However ill-conceived and absurd the movement against H. E. Sir T. Shepstone's administration may have been, it is clear that it would be folly to say that, because the Colonel approved of his wife remaining here, he thereby connived at her adultery with Gunn. When his sons told him of their mother's conduct on his return to Pretoria, the Colonel did not seriously believe in his wife's guilt. He thought that she had been imprudent, and knowing the ill-feeling existing between the mother and her sons, he did not pay the same attention to what they told him that a more suspicious or vigilant husband would perhaps have done. He felt that the political movement had to some extent placed him under an obligation to Gunn, and hence, he says, that he did not drop Gunn's acquaintance suddenly, but intended to do so by degrees. Other additional circumstances, however, occurred, and his suspicions being now thoroughly aroused as to his wife's infidelity, he determined to watch her in order to obtain proof of her guilt. This was perfectly legitimate so long as he did not facilitate or provide an opportunity for his wife to commit adultery. There exists an obvious distinction between conduct of the husband directly causing his wife's loss of virtue, and conduct pursued by him for the purpose of discovering her guilt, she having already previously fallen. The plea of connivance, therefore, has not been made good. The defence of condonation was abandoned during the argument, and very

1878
Nov. 22 to 30.
December 2.
" 9.
" 10.
" 11.
1879
January 20.

Weatherley vs. Weatherley.

properly so, because there is no evidence that Colonel Weatherley took, or agreed to take, the defendant back as his wife *rectam et integram*. Mere Christian forgiveness of the offence is not condonation. There remains yet for consideration the plea of collusion. The evidence shews that after the Colonel left the house on the Sunday he had two interviews with Mrs. Weatherley. He was induced to go down to her on the Tuesday by Mr. Reston, and on the Thursday he went to see her, owing to what had passed between her, Mr. Cooper, and the Rev. Mr. Law. On this second occasion the Colonel went into frantic abuse of Gunn, saying he would ruin him; but gave Mrs. Weatherley a kiss before leaving, promising to come down next morning again. He, however, did not go to Mrs. Weatherley on the Friday morning, because he says he discovered that Mrs. Weatherley, notwithstanding her solemn promise to him, had been in communication with Gunn after the Colonel left the house on Thursday. He then determined on bringing this action, and has never seen or spoken to Mrs. Weatherley since. On the Friday the Colonel determined to sue for a divorce, and instructed his attorney to write the following letter to the defendant:—

"My dear Mrs. WEATHERLEY,

Colonel Weatherley will sue for divorce, but will give you £400 at once, and from the £45 per month will give you £30. The life interest you have in home property in expectancy to be yours, and on your death to revert to the children. If he obtains an appointment, your monthly allowance will be increased. You can see Capt. Gunn at any time you like to fix for the appointment. Please communicate with him and arrange for an interview. I will call later on in the day."

Colonel Weatherley's attorney did call later in the day and handed her a letter from Gunn, and asked if she could trust herself to Gunn. Mrs. Weatherley replied what could she do but abide by the Colonel's decision, and arrange for an interview with Gunn. The Colonel's attorney had also written to Gunn telling him he could see Mrs. Weatherley in view of the divorce, as the Colonel consented to his doing so. It was then definitely understood that, when divorced, Mrs. Weatherley should marry Gunn. The £400 was actually handed over by the Colonel to his attorney with the view of enabling Mrs. W. to proceed to England, and the £30 monthly allowance was to be paid to her personally

even after the marriage with Gunn. The monthly allowance Mrs. Weatherley, however, declined. The question then is, upon all this evidence is Colonel Weatherley guilty of collusion, and debarred by his conduct from the relief he prays? To give a precise definition of collusion is extremely difficult, for it is a species of fraud in a legal sense, and depends entirely on the particular circumstance of each case. It is clear, however, that where the plaintiff has suffered a real injury, and *bona fide* seeks relief, there is no collusion (*Bishop*, vol. II., § 29, 4th edn.); or, as Mr. Justice Watermeyer, in his prefatory remarks to the cases on Marriage in 1 *Menz. Rep.*, p. 146, § 12, observes—"The Court will examine whether the complainant comes before them in a sufficiently clear position to entitle him or her to the relief sought." The Colonel was fully appraised of Gunn's character, and yet, wholly unasked, he not merely consents to, but actually suggests, a marriage between Mrs. Weatherley and Gunn, and couples with that suggestion the promise with respect to the £400 and the monthly allowance. This is a very different thing from sending Mrs. Weatherley to her friends, and providing her with means so as to prevent her being cast adrift in the world without support. It is absurd to suppose that when he proposed Mrs. Weatherley should marry Gunn, whom he knew to be a man of the blackest character, he was, as has been suggested, solicitous for her welfare and happiness. Gunn and Mrs. Weatherley accepted the Colonel's proposal. Both parties were playing into one another's hands all throughout. It was understood there should be no opposition offered to the Colonel's prayer for divorce; the defence on the pleadings, at that stage, was intended to be a merely colourable one, and it was agreed that the suit should be prosecuted with as little delay or publicity as possible. The proposal that Gunn and Mrs. Weatherley should intermarry is, moreover, contrary to the policy of our marriage law, which forbids the marriage of the adulterer with the adulteress (*Van der Linden* I., 3, §§ 6, 10. *Rechts Obs.*, vol. I., obs. 11. *Gr. Pl.*, bk. vol. 3, p. 507, vol. 7, p. 812.) All this would never have come to the knowledge of the Court, it would have been quietly suppressed, but for the change in the line of defence; and I do not see how the Court can

overlook such conduct. The plaintiff is not in that clear position which entitles him to the relief he seeks, and I accordingly dismiss his summons, the defendant to have her taxed costs paid by the plaintiff.

In re OOSTHUYSEN.

Absent husband.—Wife appointed curatrix of his estate.—Transfer by wife of property belonging to such estate.

1879. January 28. — In re Oosthuysen

Preller moved for an order sanctioning the transfer by Mrs. Oosthuysen of certain immovable property belonging to the joint estate of herself and her absent husband, under the following circumstances:—The applicant and her husband intermarried at Beaufort West in 1834. They subsequently removed to the Transvaal. In 1862, the husband, without any apparent reason, left his home in the Transvaal, and has not been heard of since. Mrs. Oosthuysen was, by order of the Court, on 29th October, 1878, appointed curatrix of the estate of her absent husband (*vide* Weeswet, Law No. 12, 1870). Before this order was made, she had sold to her children certain portions of the farms Klaarstroom and Tweefontein, belonging to the joint estate of herself and her absent husband. She now prayed that transfer of the portions so sold might be given by her to the said children.

The COURT ordered that transfer be given as prayed; half of the purchase-money to be paid into the Orphan Chamber, in favour of the husband's estate.

VAN RENSBERG *vs.* SWART.

Ejectment.—Damages.—Exception.

A summons, containing a prayer for ejectment against defendant, and also a prayer for compensation in damages at £5 per month, by reason of unlawful occupation by defendant, is not inconsistent.

1879. January 28

Van Rensburg vs. Swart.

Action brought by plaintiff, praying that defendant may be ordered to quit and give up possession to the plaintiff of a certain piece of land, with the building thereon; further, the plaintiff prayed that the defendant may be adjudged to pay to him compensation for his use and occupation of the land, at the rate of £5 per month, from the 2nd September, &c.

To this summons the defendant took the exception "that the same is inconsistent and bad in law, claiming, as it does, not only the ejectment of the said defendant, but also rent for use and occupation.

Ford (with him *Jorissen*), in support of the exception: The summons is bad. It regards the defendant both as a wrong-doer and a tenant. (*Birch* vs. *Wright*, 1, *T. R.* 378).

Cooper (with him *Hollard*) for the plaintiff.

The COURT held that the summons does not regard the defendant both as a wrong-doer and tenant. The plaintiff claims damages for his having been kept out of the use and occupation of his property through the wrongful act of defendant. These damages he assesses at £5 per month. This does not recognise him as a tenant, and waive the tort or wrong, and is therefore not inconsistent with the prayer for ejectment against defendant.

LEATHERN *vs.* SURTEES.

Affidavit.—Leave to sue in formâ pauperis.

1870. January 30. — Leathern vs. Surtees.

In this matter the Court ruled that it could not compel one F. to make an affidavit as to certain alleged facts. Also, that where an applicant petitions for leave to sue *in formâ pauperis*, the petition must, under Rule 63, set forth what property, if any, he possesses. Where this had not been observed, and it appeared, on the return day, that the applicant possessed immovable property in the neighbouring Colony of Natal, the Court discharged the *rule nisi*, which had been granted to show cause why leave to sue *in formâ pauperis* should not be given.

PRELLER AND DE VILLIERS *vs.* MULLER.

A summons, taken out against a defendant, who died before it was served on him, ordered to be amended by substituting the executor as defendant.

1879. February 4. — Preller and De Villiers vs. Muller.

Meintjes mentioned that the defendant in this case had died before the summons, which had previously been taken out, could be served upon him.

The COURT directed the summons to be amended and served on the executor of the estate of the deceased, as soon as he had been duly appointed and confirmed as executor by the Orphan Master.

DORE *vs.* MEINTJES.

Interdict.—Use of Water.—Action.

The proper form of proceeding, where applicant complains that respondent has diverted water from a public stream, to the detriment of his mill, is by action, and not on motion for an interdict.

1879. February 5. — Dore vs. Meintjes.

This was an application to make absolute a rule *nisi* calling on respondent to show cause why he shall not be restrained by interdict from diverting certain water from the Aapies River, to the great loss and detriment of the applicant's mill. The parties are mill-owners, working their mills with water from the Aapies River.

Cooper for the applicant.

Maarsdorp, A. G., (with him *Meintjes)* for the respondent.

The COURT held that upon the affidavits it is matter of dispute between the parties whether respondent has made an unreasonable use of the water. The proper form of proceedings, under the circumstances, is not on motion, but by action for a declaration of rights and for damages. The application was accordingly refused.

BEETON *vs.* WEMMER.

Assault.—General Issue.—Tender.

It is not competent for a defendant to plead the general issue, and then a plea of tender to the same cause of action.

1879. February 5. — Beeton vs. Wemmer.

Plaintiff brought an action for £500 as damages for assault and battery. The defendant pleaded—1st, "That, admitting he did assault the plaintiff as stated in the summons, he denies all and singular every other allegation

1879. February 5. — Beeton vs. Wemmer.

of fact and conclusion of law in the plaintiff's summons contained, and joins issue with him thereon." 2nd, "That the defendant did, by his attorney, tender the plaintiff the sum of £15 as full compensation for the assault, and offered to pay all costs incurred."

To this the plaintiff took the following exception:—"As to the defendant's special plea, by him above pleaded, the plaintiff excepts to the same as bad in law, inasmuch as the defendant having first pleaded the general issue to the whole claim of the plaintiff, it is not competent for him afterwards to plead a tender."

Cooper, in support of the exception, relied on *Jones* vs. *Borradaile, Thompson, & Co., Buch. Rep.*, 1875, p. 38. The defendant, in his first plea, admits the assault. It is not every assault which entitles to damages. Certain assaults are justifiable. Defendant denies the circumstances connected with the assault as stated in the summons, and yet he tenders £15. The two pleas are clearly inconsistent.

Preller, contra: The first plea admits the assault, and, therefore, admits the fact that plaintiff is entitled to some compensation. It is precisely the same as if the defendant had pleaded that, admitting his liability for £15, he denies all and every other allegation of fact and conclusion of law in the summons contained.

The COURT held that the first plea admits the assault, but denies the liability of the defendant; whereas the special plea of tender admits the liability to the extent of £15. This is inconsistent. The exception was, therefore, upheld with costs, and leave given to the defendant to amend his plea of general issue by inserting the words "and the defendant, save and except as to the sum of £15 in his special plea set forth, denies all and singular the allegations of fact and conclusions of law, &c." (*Cf. Jones* vs. *Borradaile, Thompson, & Co.*, cited at the Bar.)

Ex parte REHBOCK.

Arrest to found Jurisdiction.—Edictal Citation.

Where the applicant, residing in the Transvaal, stated in his affidavit that Greislich & Co., of London, were indebted to him in the sum of £150, and prayed for an arrest to found jurisdiction on certain goods in the Transvaal, the property of Greislich & Co.; the Court granted an arrest to found jurisdiction and to sue the debtor by edictal citation.

1879. February 6. Ex parte Rehbock.

Applicant, living at Heidelberg, in the Transvaal, sent an order to Greislich & Co., of London, for certain goods and merchandize. He also remitted a draft for £150 to Greislich & Co. to cover the order either in whole or part. Greislich and Co. credited applicant with the draft, and sent 17 cases of merchandize. They then drew on applicant, at 90 days' sight, for the balance of the price of the goods. These bills, so drawn, were duly accepted and handed to the Oriental Bank Corporation in Natal, who were the agents of Greislich & Co. The applicant then discovered that the goods had been hypothecated to the Bank, who would not part with the invoices and bills of lading until the drafts were paid. The applicant remonstrated with the Bank, and eventually had the bills, accepted by him for the balance of the purchase price, returned to him. The goods were subsequently consigned to Koch & Co., of Pretoria, for sale. Under these circumstances the applicant applied for an order attaching these goods in the hands of Koch & Co., to found jurisdiction, and for leave to sue Greislich & Co. by edictal citation for the £150, &c.

Cooper for the applicant.

The COURT granted the arrest to found jurisdiction, and gave leave to sue by edictal citation. Personal service of the summons to be effected on Greislich & Co.

Barrett *vs.* Executors of O'Neil.

Donation inter vivos.—*Acceptance.*—*Registration.*

Where a donation inter vivos *of land was made by a grandfather in favour of his grandson, a minor, and accepted by the father of the minor on his behalf; Held, that an action lay to compel transfer of the land in favour of the minor. A conveyance of land* coram lege loci *is equivalent to registration.*

1879.
Feb. 18 to 22.
May — 18.
Barrett vs. Executors of O'Neil.

Action brought by Benjamin Rhodes Barrett (upon leave granted by the Court on 18th September, 1877), in his capacity as guardian of the minor William Barrett, eldest son of John William Barrett, deceased, against John James O'Neil, Richard O'Neil, and Richard Charles O'Neil, executors testamentary of the estate of the late Magdalena Catharina O'Neil (born Willemse), to have the liquidation account in the said estate set aside, and the defendants ordered to pass transfer of the farm Modderfontein, in the district of Heidelberg, to, and in favor of, the said minor, William Barrett, or to pay him the value thereof, by reason of a certain donation *inter vivos*, and power of attorney made by the defendant, John James O'Neil, husband of the late Magdalena Catharina O'Neil, born Willemse, in favor of the said minor.

The defendants pleaded—1st. The general issue; and 2nd. That the alleged donation, *inter vivos*, was never completed by the said John James O'Neil, nor accepted by, or on behalf of, the said minor, William Barrett, "and that the power of attorney, mentioned in the said plaintiff's summons, was, therefore, after its execution, withdrawn by the said John James O'Neil." 3rd. That by the mutual will of the defendant, John James O'Neil, and his deceased wife Magdalena Catharina O'Neil (born Willemse), executed on the 22nd January, 1877, the farm Modderfontein is bequeathed to the said minor on the death of his mother, now likewise deceased, Sara Jacoba Barrett (born O'Neil); and the defendants, as executors testamentary, are, and always have been, willing to give transfer to

the said minor of the farm Modderfontein under the said will, the acceptance of which transfer has been refused by the plaintiff. At the trial, the defendants obtained leave to amend their first special plea by striking out the words "and that the power of attorney, mentioned in the said plaintiff's summons, was therefore, after its execution, withdrawn by the said John James O'Neil."

In his replication the plaintiff admitted that transfer of the farm Modderfontein had been offered by the defendants, subject to the conditions of the said will, but he claimed the right of demanding transfer in terms of the donation *inter vivos*. Issue hereon.

The deed of gift, said to have been executed by John James O'Neil, of the farm Modderfontein, in favour of the minor, was not put in at the trial, but evidence was led to shew such a deed of gift had actually been executed by the defendant, John James O'Neil. The plaintiff stated that the defendant, Richard Charles O'Neil, had told him either he or his father, the first-named defendant, had the deed of gift, and that he, the plaintiff, should never get it. This was, however, denied by Richard Charles O'Neil. The plaintiff further stated that on the death of John William Barrett, father of the minor, in 1876, he, as executor in the estate, was requested by his widow, mother of the minor, to send her the papers of her late husband, in order that she and Richard Charles O'Neil, her brother, might go through them. With this request the plaintiff complied, and when the papers were returned to him, the plaintiff discovered the following power of attorney, but not also the deed of gift, among them.

"I, the undersigned, John James O'Neil, declare by these presents to nominate and appoint Mr. J. W. Barrett, in my name and stead, to pass transfer to my grandchild William Barrett, son of the said J. W. Barrett, of the farm called Modderfontein, situated in the district of Heidelberg, S. A. Republic, according to deed of gift made by me this day, and annexed hereto. . . . . Thus done at Belfast, Newcastle, Natal, this 1st day of January, 1873.

"J. J. O'NEIL.

"As Witnesses:
"R. C. O'NEIL.
"J. J. O'NEIL."

This power was in the handwriting of J. W. Barrett, and its due execution was denied by the defendant, John James

1879.
Feb. 18 to 22.
May 18.

Barrett vs. Executors of O'Neil.

O'Neil, and the two witnesses, R. C. O'Neil and J. J. O'Neil. It was proved that John James O'Neil was in the habit of asking persons to write out documents for him. One of the witnesses for the defence also stated that the late John William Barrett had endeavoured by dishonest means to obtain transfer of the farm Modderfontein in favor of the minor. It was further proved that, after the date of the power of attorney, the late John William Barrett leased the farm Modderfontein and received the rent. A witness, Henry Barrett, deposed that his brother, the late John William Barrett, had, on one occasion, read out to him the deed of gift mentioned in the power of attorney. A letter has also been written by Mathias Coetzee, an agent practising at Middleburg, to Richard Charles O'Neil, in which, on behalf of the plaintiff, the delivery up of the deed of gift was demanded from him. To this letter the defendant, John James O'Neil, sent the following reply:

"Klipfontein, 2nd July, 1877.

"DEAR SIR,

"Your letter of 23rd June last this day to hand. In answer thereto, it must be observed that all gifts, *inter vivos* or otherwise, are revoked by the last will made by my deceased wife and myself, in presence of witnesses, on 22nd January, 1877, and approved by the Orphan Master at Pretoria. In this will, it is provided that the farm Modderfontein, after the decease of the mother, devolves in ownership upon William Barrett. In the same manner as mentioned in your letter, as the bequest is made to each of children. . . .

"I have, &c.,

"J. J. O'NEIL."

De Vries (with him *Cooper*) for the plaintiff: The power of attorney was found among the papers of the late John William Barrett. Neither the deceased nor the plaintiff is benefitted in any way by this power. There is no ground for concluding that the power is not genuine. It is only an afterthought on behalf of the defendants to deny the existence and genuineness of the power. Hence, the application by defendants to amend their special plea, by which the existence of the power was tacitly admitted. In answer to Mr. Coetzee's letter, demanding the delivery up of the deed of gift, it is not denied that there was such a document in existence, but it is urged that the gift is revoked by the will. The evidence shews not merely that a gift or donation

had been made, it was also proved the gift had been accepted by the late John William Barrett for his minor son. The power of attorney was found among his papers, and he also leased the farm Modderfontein and drew the rent.

Cooper followed on the same side, and referred to *Van Leeuwen* (Rom. Dutch Law), bk. 4, ch. 30; *Kersteman, Regts. W. B., Donatio inter vivos, et Aanhangs.*, p. 389, *in verb Donatio; Lybrechts R. V.*, p. 204, ch. 16; *Grotius*, p. 305 (edn. Maasdorp); *Van der Berg, Neerl. Advb.*, vol. 2, adv. 38; *Van der Keessel, Th.* 485, 489.

Ford (with him *Preller*) for the defendants: The existence of the deed of gift, and the genuineness of the power of attorney, are positively denied on oath by Richard Charles O'Neil and John James O'Neil. There is no proof of any cause or motive for the gift. The power of attorney is dated 1st January, 1873, and how is it that it was never acted on by J. W. Barrett, who died in 1876? There is no clear evidence of acceptance as required by law. *Van der Linden* (Henry's edition), p. 215; nor has there been any registration of the deed of gift. *Grotius* (Maasdorp's edition), p. 307, § 12 and 15. *Tennant's Notary's Manual*, 4th edn., p. 257, 259. *Van der Keessel, Th.* 489. If the Court is against the defendants, the costs will have to come out of the estate of which defendants are the executors, but if the Court is in their favour, the plaintiff must pay the costs. He further referred to *Huber, Heed Regtsgel.*, bk. 3, ch. 11, § 8 and 13. *Kersteman, Aanhangsel*, fol. 396.

Cooper in reply.

Cur adv. vult.

Postea (13th May).

Korzé, J., having stated the pleadings, and reviewed the facts, said: The documentary evidence seems to me to support the contention of the plaintiff, and the demeanour of the witnesses for the defence, while undergoing examination, has not made a favourable impression on me. Upon the whole, I have come to the conclusion that the power of attorney is genuine, and was duly executed by the de-

1879.
Feb. 18 to 22.
May ___ 18.
Barrett vs. Executors of O'Neil.

fendant, John James O'Neil, and attested by Richard Charles O'Neil and his brother, John James O'Neil; and, further, that a valid deed of donation *inter vivos* was executed by the defendant, John James O'Neil, of the farm Modderfontein, as stated in the power of attorney, in favour of the minor. The donation is a purely voluntary one, and nothing has been produced to show the exercise of any undue influence, or the practice of any deceit, by the deceased J. W. Barrett upon the defendant, John James O'Neil. With reference to the plea that the gift was never completed by the defendant, John James O'Neil, I must observe that this is the very reason why the present action is brought—viz., to compel transfer of the farm in the minor's favour, and so complete the gift. But then it is said the gift was never accepted by the minor, or any one on his behalf. I think the evidence has established the acceptance by the father, J. W. Barrett, of the gift in favour of his minor son. Acceptance by the father on behalf of his minor son is good in law. To render a donation *inter vivos* binding there must be acceptance of the gift by the donee or some one acting for him, and all the authorities are agreed that no particular form of acceptance is necessary, for it may be manifested in any way in which assent may be given or indicated. (*Cf. Grotius*, 3, 2, 12. *Cens. For. I.*, 2, 8, § 4. *Voet* 39, 5, 11-12.)

If was further argued on behalf of the defendant, John James O'Neil, that registration was necessary to give the donation validity. According to the Roman law, a donation of property above the value of 500 *aurei*, or ducats, had to be publicly registered; but Grotius maintains that this provision of the civil law does not obtain in Holland (*Introd.*, 3, 2, 15). Groenewegen, Huber, Van Leeuwen, Voet, and Van der Keessel, all lay down that, as there exists no custom, law, or decision in Holland to the contrary, registration of a donation, as prescribed by the Roman law, is still necessary. Loenius, in his *Decisiones, cas.* 123, *n.* 3, adopts a middle view, and says that a donation of immovable property only requires registration. It is remarkable that, although nearly all the Dutch commentators have differed from Grotius, the jurists in the *Regtgeleerde Observatien* on the *Introduction* of Grotius

have not even touched upon the question. Van der Linden, however, who is the most recent writer on the law of Holland, before the introduction of the Code, adopts the same view as Grotius (*vide* his *Institutes on the Law of Holland*, bk. 1, ch. 15, § 1). In the case of *Brink* vs. *Executors of Van der Byl* (1 *Menz.*, 552) it was, *inter alia*, contended that registration was an indispensable requisite to the validity of a donation. The Court, without deciding this precise point, held that the particular donation *sub judice* was a *donatio remuneratoria*, made by the donor for services rendered by the donee, and that this species of donation did not require to be registered. The weight of authority seems to be against the position, as broadly laid down by Grotius, and I must accordingly hold that where the donation exceeds the value of 500 *aurei*, the want of registration invalidates so much of the donation as is in excess of this amount. (*Cens. For. pt.* 1. *lib.* 2, 8, § 5. *Voet*, 39, 5, 15. *Huber. Jus Hodiernum*, 3, 14, 12). When once a donation has been accepted, the donee has a right of action against the donor to compel him to make tradition, or to give transfer of the subject matter of the donation, even although there has been no registration, as in the present case. There is a decision of the Supreme Court of the Cape Colony which is directly in point. I allude to the case of *Melck* vs. *David*, 3 *Menz.*, 468. There it was held that a donation of land by a master to his servant, by an *unregistered* deed, was good and valid, so as to bind the donor's executor to effect transfer in favour of the donee. The distinction here drawn is important. Although registration may be necessary to the validity of a donation above 500 *aurei*, and, consequently, an unregistered donation above this amount would not hold good as against the creditors of the donor; still, as between donor and donee, once a donation has been definitely accepted, the former can be compelled by action to make tradition of the gift to the donee. Until tradition or transfer has taken place, the donee has merely a personal right against the donor; but as soon as transfer has been made *coram lege loci*, the donation may be valid even as against the donor's creditors, for transfer *coram lege loci* is equivalent to registration (*Voet*, 39, 5, 18). The point, therefore, advanced on behalf of the

1879.
Feb. 19 to 28.
May 18.

Barrett vs. Executors of O'Neil.

defendant, John James O'Neil, the donor, that he cannot be compelled to give transfer of the farm Modderfontein in favour of the minor, because the donation is not registered, is no answer to the action. The donor is bound to complete the gift by effecting transfer, which, when made, will be registered as required by the local law. The farm Modderfontein must therefore be transferred by the defendant, John James O'Neil, in favour of the minor, William Barrett and the liquidation account must be amended by striking out from it this farm as an asset in the joint estate of the defendant, John James O'Neil, and his deceased wife, born Willemse. The costs of this action will come out of the estate.

THE QUEEN *vs.* DAVID LYNX.

Conviction by a Landdrost set aside, where the evidence against the prisoner was not given in his presence, nor under oath.

1879.
February 25.

The Queen vs. Daivd Lynx.

KOTZÉ, J.: This is a case from the Landdrost at Christiana, and referred to me by the Attorney-General. The prisoner, a Koranna, was charged with stealing a cow and calf, the property of one Pretorius. The Landdrost found him guilty, and sentenced the prisoner to three months' imprisonment. The evidence of a witness, on whose testimony he was convicted, was taken in the absence of the prisoner. This cannot be allowed. The Landdrost also found prisoner guilty of defying and resisting the Messenger of the Court in the execution of his duty, and sentenced him to a further term of imprisonment for three months. The only evidence was the written return of the Messenger, who ought to have been called and sworn. The conviction, in both instances, must, therefore, be quashed.

Ex parte WEATHERLEY.

Alimony to wife refused where she had ample means of her own, and the husband's income was limited.

1879. February 25.

Ex parte Weatherley.

This was an application for alimony, under the following circumstances: The husband of applicant sued her for divorce, on the ground of adultery. The Court found that the adultery had been proved, but dismissed the husband's summons on the plea of collusion. The husband was Colonel of a Volunteer Corps, temporarily raised by the Government, and his income was limited. The applicant was entitled to the interest of £14,000 invested in England, and had besides separate property of her own. She prayed that her husband may be ordered to pay certain household expenses, which she had contracted since he had left her, and further, allow her the sum of £50 per month.

De Vries appeared in support of the application.

The COURT held that applicant had a sufficient income of her own, and was not entitled to alimony out of her husband's limited salary.

GAISFORD *vs.* MARAIS & CO.

Interdict.—Action.

An interdict will be refused where the applicant has an adequate remedy by action.

1879. March 6.

Gaisford vs. Marais & Co.

The applicant, Gaisford, employed Marais & Co. to order certain goods for him, for which he agreed to pay the cost price, together with 10 per cent. commission. Marais & Co., hearing that Gaisford was about to dispose of his business, sold and delivered the goods to Sleightholm, of

1879. March 6. — Gainford vs. Marais & Co.

Pretoria. It appeared that Marais & Co. had been misinformed as to the intention of applicant to retire from business.

Hollard, for the applicant, moved for an interdict or arrest on the goods.

De Vries for the respondent.

The COURT held that applicant had an adequate remedy by action, and refused the application with costs.

TIPPER AND GOOD *vs.* VAN DEN BURG.

A commission de bene esse *refused, where the plaintiffs resided in Natal and the defendant in the Free State, but had immovable property in the Transvaal.*

1879. March 7. — Tipper & Good vs. Van den Burg.

Cooper moves for a commission *de bene esse* to examine witnesses in Natal with reference to the claim of the plaintiffs, who are traders in Natal, against defendant, living in the Free State. The defendant is sued in this Court, and has immovable property in the Transvaal.

The COURT refused the application, as at least some evidence should be led before the Court at the trial.

RUSSELL *vs.* VON GRASSOUW.

Land registered in name of a minor.

In an action by a judgment creditor of the father, the Court refused to set aside a bona fide *transfer of land registered in the name of his minor son, the purchase price for which had been paid by the father.*

1879.
March 8.
April 8.

Russell vs. Von Grassouw

Russell brought an action to have a certain half erf, No. 2 block C, situate in the town of Heidelberg, declared the property of Fritz von Grassouw, the defendant. Russell, the plaintiff, had obtained a judgment against the defendant in the Court of the Landdrost and Heemraden on the 3rd May, 1876, for the sum of £240 8s 9d. Against this judgment defendant noted an appeal, and on the 6th May, 1876, he appeared before the Landdrost of Heidelberg (in accordance with the provisions of § 35 of the Civ. Procedure of 1874) to give as security for costs and of judgment, in case it should be confirmed on appeal, the half erf No. 2 block C, together with the buildings thereon, situate in the town of Heidelberg, and standing registered in the name of his minor son. This property the defendant thus secured "in his capacity as guardian and father of the minor Frederick Carl Ludwig von Grassouw." The appeal was not prosecuted by the defendant, and a writ of execution was taken out against the half erf No. 2, which was sold in execution by the Sheriff of Heidelberg. The minor thereupon made an application on oath to Kotzé, J., in chambers, stating that the said half erf was his property, and an interdict was according granted, restraining the transfer of the half erf to the purchaser at the sale in execution, pending an action to be brought by Russell, the plaintiff, against the defendant and the minor, assisted by his curator *ad litem*, for the purpose of having the right of property in the half erf decided. At the trial it appeared that the half erf in question was, on the 6th October, 1876, transferred by C. Meyer to and in favour of the minor, F. C. L. von Grassouw, assisted by his father. The minor was then 15 years of age. The purchase price mentioned in the transfer was £20, and this was paid by the defendant, the father of the minor. A building was erected on the erf by instructions of the father, and was let by him. The rent was received by the defendant, and not by the minor. In July, 1877, the defendant made an application to the High Court for time to pay his debts, under the Roman-Dutch practice, and filed a list of his assets. In this list he represented the half erf No. 2 as being his property. The application for attermination was, however, refused by the Court. The defendant had also, in December, 1876, stated to one Braun,

1879.
March 8.
April 8.

Russell vs. Von Grassouw.

to whom he had leased a canteen on the said half erf for five years, that he did so in order to prevent Russell, the plaintiff, from taking out execution against the half erf and the buildings thereon.

De Vries, for the plaintiff, cited *Van der Linden*, bk. I., ch. 15, § 1, to show that a father cannot make a gift to his minor son. He also referred to *Kerr on Fraud*, p. 144, and argued that the house on the half erf had been built with the plaintiff's money.

Meintjes, curator ad litem, for the minor. The transaction was *bona fide* at the time transfer was given by Meyer in favor of the minor. There is no proof of fraud, and the minor cannot suffer for the subsequent conduct of his father.

Postea (April 8).

The COURT held that the transfer from Meyer direct to the minor, assisted by his father, could not be set aside merely because two years later the defendant father entered into the written agreement securing to the Transvaal and buildings thereon in satisfaction of the judgment debt. The Landdrost should not have allowed Von Grassouw, the father, to execute such a security, binding the property of the minor for the sole benefit of the father. There was evidence to prove that in the list filed by the defendant in support of his application for attermination he mentions this half erf as being his property, but in the written security, executed before the Landdrost, he says that he binds the half erf as father and guardian of his minor son. The erf stands registered in the name of the minor. There is nothing to show that at the time of the transfer in favor of the minor the defendant was in insolvent circumstances. The buildings must go with the erf. It may be probable, as contended by Mr. De Vries, that the money realized by Von Grassouw from the sale of goods supplied to him by Russell, was expended for the purpose of building on this erf, but there is no proof of it, nor was this money advanced by Russell on the security of the buildings. The minor could not, therefore, be deprived of that which stands registered in his name as his own property in the Registry of Deeds. Absolution from the instance was accordingly granted, with costs.

THE QUEEN *vs.* POTTS.

An application for the postponement of a criminal trial refused, where no attempt had been made to supœna certain witnesses, whose evidence it was alleged was material.

1879. March 11. — The Queen vs Potts.

The Attorney-General applied for a postponement of the trial in the above case. Two material witnesses for the Crown, Captain Ferreira and Sergeant Lourens, were unavoidably absent on military duty, owing to the operations against the native chiefs Sekukuni and Cetewayo. These two witnesses had not been supœnaed on the ground that the military authorities had stated it would be impossible for them to attend at the trial. The application was made under § 95 of the Criminal procedure Act, 1864.

Jorissen, for Potts, contended that, under § 95, the trial could be postponed only on the ground of absence of material witnesses, who had been properly subpœnaed to appear at the trial. The Court is not bound by what may be expedient in the opinion of the military authorities. It is only under unforeseen circumstances that a postponement can be granted. There are no such unforeseen circumstances in this case, because in January last, when prisoner was committed for trial, the same circumstances which now exist already existed at that time.

The COURT refused the application on the ground that no attempt had been made to subpœna the witnesses.

WHITE & TUCKER *vs.* RUDOLPH.

Forcible seizure of spirituous liquor.—Necessity.—Spoliation.—Annexation Proclamation.—Practice.

Where, under an illegal order, the store of the applicants, who were licensed dealers in wines and spirits, had been forcibly entered and the stock of liquors therein seized

and removed: Held that, although an action might have been brought by them, the applicants were entitled, on motion, to an order directing the immediate restoration of the liquor so seized, for spoliatus ante omnia restituendus.

By virtue of the Annexation Proclamation of 12th April, 1877, neither the Crown nor the Local Administrator has power to legislate for the territory of the Transvaal.

The meaning of the maxim, Necessitas non habet legem quod cogit defendit, *is not that necessity overrides all law and is superior to it; but that the law justifies in certain cases, as where the safety of the State is in imminent danger, a departure from the ordinary principles protecting the subject in his right of private property. It is not every necessity that will justify a departure from the ordinary principles of law. It must be necessity extreme and imminent.*

1879.
May 16.
" 17.

White & Tucker vs. Rudolph.

This was an application to make absolute a rule *nisi* served upon G. M. Rudolph, Landdrost of Utrecht, to show cause why a certain order made by him, on the 15th April, 1879, shall not be set aside, and the wines and spirits belonging to the applicants, which had been taken forcible possession of under authority of the said order, be forthwith restored to them.

In the month of January, 1879, Colonel Evelyn Wood, commanding No. 4 Column against the Zulus, applied to the respondent, as Landdrost of Utrecht, in the territory of the Transvaal, to refuse the issue of spirit licenses for that year, in order to prevent drunkenness among the soldiers, volunteers, wagon-drivers, and camp-followers. The respondent thereupon referred the matter to the Government at Pretoria, and received instructions to issue spirit licences to persons who might apply for them. A license was accordingly issued by the respondent to the applicants, White and Tucker, on the 4th February, 1879, to open a bottle store for the year on Erf No. 166, in the town of Utrecht, and for this license the applicants paid the respondent, as Landdrost, the sum of £25. Colonel Wood subsequently requested the re-

spondent to seize all spirits in Utrecht, but the respondent replied he had no power to do so. Colonel Wood, on the 27th February, wrote from Kambula Hill, in Zululand, to the Administrator of the Transvaal, representing that, if the indiscriminate issue of licences is continued, it would be impossible to maintain "that discipline and vigilance of the garrison which is essential," and adding, "You will observe that I have already instructed the Landdrost that no licenses for the sale of liquor are to be granted." Colonel Wood also suggested that if the law prevented the withholding of licences, it would be expedient to declare martial law. Thereupon the Administrator of the Transvaal, Colonel Owen Lanyon, in a minute of the 8th March, desired the Colonial Secretary to instruct the respondent, as Landdrost of Utrecht, that the sale of liquor to the troops must be stopped, as soldiers could not properly discharge their duties when drunk, and, further, that if the respondent found that his orders with reference to the sale of liquor were not obeyed, he must take possession of the liquor until active field operations in Zululand are over. The Colonial Secretary, Mr. Osborn, by an endorsement to this minute, brought to the notice of the Administrator that the existing licences to sell spirits had been granted by the respondent in accordance with the local law, "which does not authorise the imposing of any restrictions subsequent to the granting of a licence." The Administrator thereupon, on the 10th March, wrote another minute, as follows: "Critical times require prompt remedies, and if the law enacts anything which may be contrary to the safety of the country, we must act contrary to that law so long as the public safety is endangered. Mr. Rudolph will therefore act accordingly, taking due care that what he does is necessary for the military exigencies of the moment, and in accordance with the wish of the senior military officer present." This minute the respondent brought to the notice of Colonel Bray, the senior military officer in command at Utrecht. On the 28th March Colonel Bray wrote to the respondent, stating that stronger measures should be taken to stop the sale of all spirituous liquor to the natives or camp-followers, who in turn sell it to the soldiers, and that several cases of drunkenness among the

1879.
May 16.
" 17.
White & Tucker vs. Rudolph.

soldiers had again occurred, thereby endangering the safety of the place. He also requested the respondent to give a final warning to the storekeepers not to sell spirituous liquors to natives, soldiers or camp-followers, failing which he would be obliged to call upon respondent to take possession of all such liquor till the end of the war. On the 29th March, Mr. H. Shepstone, on behalf of the respondent, addressed a letter to the four licence-holders of the town of Utrecht, requesting them not to sell liquor to any of the troops, camp-followers or natives, pointing out at the same time that the safety of the town necessitated such a course. The letter then proceeded to state that if the sale of liquor was not discontinued, the licences issued would be cancelled, and all liquor in possession of the licence-holders would be seized and kept possession of till active field operations were over. The respondent, on the 9th April, wrote to Colonel Wood, telling him that he had received a minute from Colonel Bray, in command at Utrecht, and that in compliance therewith he had duly warned the storekeepers, and was glad to inform Colonel Wood that since this warning no case of drunkenness had been brought to his knowledge. To this letter Colonel Wood, on the 13th April, sent the following reply to the respondent, from Kambula, in Zululand: "With reference to your letter of 9th April, stating that since your final warning no case of drunkennes had been brought to your notice, I desire to point out to you that, on the day on which you wrote to me, four soldiers and a civilian interpreter got helplessly drunk in Utrecht. I call on you to search every house in Utrecht, other than those of the military establishments, and every wagon coming into Utrecht, and you will seize, store, and take charge of, or remove to Newcastle, at your discretion, all spirits you may find. You will forbid the sale of beer, or any other fermented liquor, to soldiers or natives, whether in Government employ or not, and for so doing this shall be your authority. You will show this letter to the officer commanding the troops, who is hereby directed to render you all the assistance in his power." Hereupon the respondent, on the 14th April, wrote to Colonel Bray, the officer commanding the troops in Utrecht, requesting that four guards

of two or three men each, might be furnished, "to assist me in seizing and searching the different stores and houses," and on the following day, 15th April, the respondent issued the following order :—

"Landdrost Office, Utrecht.

"The bearers have authority and are commanded to seize all spirits which may be found in any store, house, or wagon in Utrecht, to be stored by Government until active field operations against the Zulu nation are over. Every person is hereby strictly forbidden to sell or give beer, or any other fermented liquor, to soldiers or natives, whether in Government employ or not.

"G. M. RUDOLPH,
"Landdrost."

On the morning of the 18th April, a sergeant and three men, all armed, came down to the store of the applicants, and the three men were placed on guard round the store with fixed bayonets Hereupon Charles Stanhope Hawes, who was in the employ of applicants, inquired of the sergeant the reason of this proceeding. The sergeant then produced the above order. About two hours afterwards, the Messenger of the Landdrost Court, and the Chief Constable, who were armed, together with some natives and a horse-wagon, appeared at the store of the applicants. The Messenger demanded the delivery of all spirits from Mr. Hawes, which he, however, refused to give up. Hawes then closed the doors of the store. Captain Middleton, of the 2-4th Regiment and a staff officer, then came up, and demanded admittance into the store, whereupon Hawes replied that his orders were that the doors should be closed. Captain Middleton asked if this was the only answer he was to take back to the respondent, and Hawes replied in the affirmative. A file of ten armed men of the 4th Regiment, under command of Lieutenant Crofton, subsequently arrived at the store, accompanied by the Messenger and Chief Constable. Admittance was again demanded and. refused, whereupon Lieutenant Crofton said the doors would have to be broken open. A dispute arose between the Messenger and Lieutenant Crofton, as to who should break open the doors, and eventually Lieutenant Crofton gave orders to do so. A pioneer, with a crowbar, thereupon broke the door open, Mr. Tucker, one of the applicants, and Hawes pro-

1879.
May 16.
" 17.

White & Tucker vs Rudolph.

testing against this being done. The Messenger then entered the store, and commenced removing the spirits, a list of the spirits removed being taken by Tucker and Hawes. From the affidavits filed, it appeared that a good deal of drunkenness had from time to time occurred among the soldiers, volunteers, and natives, to the great annoyance and danger of the inhabitants of Utrecht, and endangering the safety of the town. Riots and scares were caused by drunken soldiers, and a small house had been burnt down by some drunken volunteers. The respondent, in his affidavit, stated that spirits in the hands of storekeepers endanger the public safety; there was, however, nothing to shew that the applicants had made an abuse of their licence, or had sold any liquor to soldiers.

Cooper (with him *Cloete*) moved that the rule *nisi* be made absolute.

Maasdorp (Attorney-General) showed cause: Nothing contrary to law had taken place (*vide* Ordinance of 7th April, 1858, Art. 6, regulating the sale of liquor). The Administrator may not refuse a licence; but where a licence has been granted, and its privileges are abused, to the imminent peril of the public safety, the Court will interfere and restrict the privileges under the licence to sell spirituous liquors. If this be true in time of peace, *a fortoiri* it must apply in time of war. In cases of emergency, the Administrator is vested with greater administrative power. He must act in the public interest, and for the safety of the whole community. *Salus populi suprema lex.* (*Broom, Leg. Max.*, p. 1, 5th edn.) The Court should not scrutinise the conduct of the local Government too closely. Had the officer in command at Utrecht taken possession of a private house, barricaded and loopholed it, in the belief that this was necessary for the protection of the town, the Court would not have interfered. *Necessitas non habet legem.* (*Grot. de Jure Belli ac Pacis*, bk. 3, ch. 20, § 7; and *Broom Leg. Max.*, page 2, *in notis*). The matter in dispute cannot be decided on motion merely, an action must be brought by the applicants, in order that the Court may have all the witnesses before it, and judge whether the necessity was so great as to justify the issuing

of the order complained of. The applicants were trading on the drunkenness of the soldiers and camp-followers, and were defying the local authorities. The officers on the spot should be presumed to have some foundation for their assertion that the indiscriminate sale of liquor in Utrecht is detrimental to the public safety. [The Attorney-General also referred to *Forsyth's Cases and Opinions on Constitutional Law*, p. 441 and p. 423; the case of the Spanish prisoners and opinion of R. West.]

Cooper: The military authorities would not have stopped the sale of liquor in this arbitrary way, had it not interfered with the sale of liquor at the canteen of the military camp. In the month of January the military power had already endeavoured to prevent applicants from getting a licence. This shows that the necessity was not so great. The civil rights of the subject must be protected against invasion. Colonel Wood had no authority to issue an order from Kambula Camp, in Zululand, directing the Landdrost of Utrecht, who is an official of the Transvaal, and bound by the law of this territory, to issue an illegal order. *(Grondwet,* § 62 and § 139.) The Administrator, in his minute of 8th March, says the sale of liquor shall be forbidden to soldiers. On the 9th April, the respondent writes this order has been obeyed. It was upon Colonel Wood's letter, of 13th April, to the respondent, that the latter issued the order against which the applicants complain. This is contrary to the Administrator's minute of 8th March; it is much more stringent, and therefore not binding. The military exigency mentioned in the minute of the Administrator, of 10th March, is, according to Colonel Wood's letter of 13th April, the getting drunk of four soldiers and an interpreter. There is no allegation or proof whatever that the applicants had supplied liquor to the soldiers, or had abused the privileges of their licence in any way. *(Addison on Torts,* p. 29, 4th edn.) On the 10th March, the Administrator wrote; "We must act contrary to the law." The Annexation Proclamation, of 12th April, 1877, says the existing laws cannot be altered, except by legislative authority. If the Court does not protect the applicants, despotism will prevail in the land.

1879.
May 16.
" 1.

White & Tucker vs. Rudolph.

Cloete followed on the same side. He cited Stratton's case (*Broom's Constitutional Law*, p. 732). The necessity in this case was neither extreme nor imminent. The matter had been under consideration from the month of February, and where then was the imminent necessity? No martial law has been proclaimed in the district of Utrecht. After the matter had been brought to the notice of the local Government, a licence was issued to the applicants, for which they paid £25. The order of the respondent is absurd on the face of it. It directs the seizure of all the liquor. It is, moreover, indefinite in point of time, for the war against the Zulu nation may not be over for years. The instructions of the Administrator do not authorise the issue of so sweeping an order.

Postea (May 17th).

KOTZÉ, J: It is clear the respondent, as Landdrost of Utrecht, issued the order of which the applicants complain, and seized their stock of liquors under it, upon the authority of the minute of 10th March from the Administrator; for, although Colonel Wood had previously endeavoured to induce the respondent to stop the sale of liquor, the latter informed him he had no power to do so; and it was only after the minute of 10th March that the respondent obeyed Colonel Wood's instructions, sent from Zululand on the 13th April. It is also clear that, *prima facie*, the instructions contained in the Administrator's minute of 10th March, and acted upon by the respondent, amount to an undue interference with the applicants' right in the free use, enjoyment, and disposal of their property. The exercise of this right can only be controlled in the manner indicated by the law; and the question at once arises, has the Administrator power either himself to issue an order, like the one complained of, or to cause its being issued by a subordinate Magistrate, like the respondent? The Administrator derives his authority from the Crown, and can consequently have no greater power than the Crown itself possesses. Now, what is the relation existing between the prerogative of the Sovereign and the right of private property of each subject in this territory of the Transvaal? I regard what has been done as equivalent to an act which

would ordinarily require the sanction of the Legislature for its validity, and I will, first of all, consider whether the Crown has any power to legislate for this country. The mode of acquisition; the manner in which the Transvaal became a portion of Her Majesty's dominions, is neither that of occupancy, conquest nor cession. We have here to deal with a case *sui generis*, and must look to the Annexation Proclamation of 12th April, 1877, confirmed by Her Majesty. The Proclamation is a solemn treaty, entered into between the Crown and the people of this country, and is the basis upon which the Transvaal has become a member of the British Empire. Every stipulation contained in that Proclamation has a binding effect, and must be strictly observed; the more so, as even in the case of a conquered or ceded colony, the power of the Crown to legislate, which otherwise would be absolute in such colony, may be controlled by the terms of capitulation or cession (per Cockburn, C. J. *Reg.* vs. *Nelson and Brand*, p. 10, *Forsyth, Constitutional Law*, p. 16.) It is provided by the Annexation Proclamation that the Transvaal will *remain* a separate Government, with its *own laws and legislature;* and that the laws now in force in the State will be retained, until altered by competent legislative authority. At the time of annexation the Transvaal had a legislature of its own, and the Proclamation expressly guarantees the continuance of the local Legislature, although, perhaps, not necessarily constituted in the same form as previously. This, then, would be analogous to the case of *Campbell* vs. *Hall* (*Cowp. Rep.* 240), where it was decided by Lord Mansfield that if the King, by Royal Proclamation, or otherwise, delegates to a legislative assembly, erected in a conquered country, the subordinate power of legislation vested in him, he thereby deprives himself of the right of afterwards exercising it again. The only difference between that case and the present being, that in the former the King parted with the power of legislation which he actually possessed, whereas in the latter instance Her Majesty, on the annexation, proclaimed that she was unwilling to claim and acquire for herself the power to legislate which she previously did not possess. In my humble judgment, therefore, the Crown can not exercise the right of legislation over this country;

1879
May 16.
" 17.

White & Tucker vs. Rudolph.

although, of course, the Transvaal, being a portion of the British Empire, is subject to legislation by the Imperial Parliament. It follows that His Excellency, the Administrator, can also not exercise any legislative power in this territory.

But, then, it was argued, with great ability, by the Attorney-General, that, under certain circumstances, the Administrator may, in case of necessity, take measures to prevent acts, done by private persons with their property, endangering the public safety, upon the principle that *salus populi suprema lex;* and he put the case of the officer in command at Utrecht barricading and loopholing a private house in order to repel a hostile attack. In support of this contention he cited *Broom's Legal Maxims,* p. 1 and 2, and *Grotius, de jure belli ac pacis III.,* 20, § 7. It must be admitted that the law distinctly recognizes the maxim *necessitas non habet legem, quod cogit defendit.* The meaning of this is not, as some writers lay down, that necessity overrides all law, and is superior to it; but that the law justifies in certain cases, as where the safety of the State is in imminent danger, a departure from the ordinary principles protecting the subject in his right of private property. This right of private property is sacred and inviolable: any interference with it is, *prima facie,* wrongful and unlawful, and it is incumbent upon the respondent in the present instance to justify what he has done by shewing that it was dictated by necessity the most urgent; for, as Lord Stowell puts it, "the positive injunctions of the law, if proved to be violated, can give way to nothing but the clearest proof of the necessity that compelled the violation." It is not every necessity that will justify a departure from the ordinary principles of law. It must be necessity extreme and imminent. If other less stringent measures would have sufficed; if a more lenient, or less violent, method could effectually have been adopted, then there is no justification or excuse for breaking into the premises of the applicants, and seizing and removing the goods stored therein. I proceed to apply these principles to the facts before the Court.

The affidavits of Mr. Zietsman and the respondent shew that a good deal of drunkenness has been going on in the

town of Utrecht within the last few months, among the soldiers, volunteers, and natives, to the great annoyance of the inhabitants, and the danger of the town. Riots have taken place, and scares caused by drunken soldiers firing off their rifles at night; and on one occasion a small house was burnt by some drunken volunteers. The respondent states he has endeavoured, by all legal and fair means, to stop the sale of liquor to soldiers, but to no purpose. There appear to be four licensed dealers in spirituous liquor in the town of Utrecht, and there is no proof that the applicants have abused the privileges secured to them by their licence, nor is there anything to show that they have sold spirituous liquor to soldiers. On the 9th of April the respondent wrote to Colonel Wood that since the warning of the 29th March no case of drunkenness had occurred. Ten clear days, therefore, had elapsed without any instance of drunkenness occurring, and during which the warning of the respondent must have been observed. Colonel Wood, it is true, states that on the 9th of April four soldiers and an interpreter had been intoxicated. Colonel Wood was not in Utrecht at that time, but in Zululand, and must, therefore, have obtained his information from others. No investigation seems to have been made how these men got supplied with liquor, but a peremptory command to seize all liquor in the town is forthwith addressed by the Colonel to the respondent, as Landdrost, who thereupon issued the order of which the applicants complain, and under which their property was forcibly carried off. Surely, if soldiers get drunk, the officer in command has the means of punishing them, and can issue an order that they are not to visit canteens and stores on pain also of punishment. The respondent states that drunken soldiers have fired off their rifles at night, but I should think that if strict discipline is enforced, and strict vigilance observed, intoxicated soldiers would soon be detected, and could be placed in safe-keeping for the night. It is only recently that certain portions of this city were placed in a state of defence, in expectation of an attack, but no one ever heard it suggested that all the hotels and canteens were to be closed indefinitely, and all spirituous liquors, contained therein, seized and kept during the pleasure of the Government. The order, in the present

1879.
May 16.
" 17.

White & Tucker vs. Rudolph.

instance, goes further; it directs the seizure of all spirits which may be found in any store, house, or wagon in Utrecht, to be stored by Government till active field operations against the Zulu nation are over. It follows that, for an indefinite period of time, a traveller, or any respectable citizen, is prevented from obtaining even a glass of spirituous liquor in the town of Utrecht, and the applicants deprived of dealing with their stock of liquors, portion of which they may be able to send on elsewhere, simply because sufficient discipline appears not to be maintained among the troops of the garrison at Utrecht. Nothing has been proved against the applicants, and where a very important question of constitutional law is involved, as it undoubtedly is in this instance, the Court must be thoroughly satisfied that the necessity of the case was so great and imminent that to delay action would have been productive of the most mischievous results. Since the beginning of the year Colonel Wood has been anxious of stopping the sale of liquor (and there was ample time for a meeting of the principal Executive Officers being consulted by the Administrator, and if a resolution had been arrived at, on consultation with them, that it was necessary, as a temporary measure, while the public safety imperatively demanded it, that certain restrictions should be placed on the sale of liquor at Utrecht, this could have been done by a proclamation in the *Gazette*, setting forth the exigencies of the case). There is good reason to believe that a more moderate course, had it been adopted, would have produced the desired end.

As to the contention that an action is the suitable remedy in a case like the present, I am of opinion that, although that course might have been adopted, the applicants are not prevented, under the circumstances disclosed, from seeking immediate redress by applying for a rule. *Spoliatus ante omnia restituendus est.* A good deal was said, during the argument, about military interference and despotism, and certainly Colonel Wood's letters do savour somewhat of the dictatorial. As a consitutional judge, I can come to no other conclusion than that the circumstances disclosed did not justify the issuing of so strict and sweeping an order, which is contrary to law. The rule must be made

absolute, and the respondent directed to restore to the applicants the property removed from their store, under the illegal order of 15th April. There will be no order as to costs.

1879.
May 16.
" 17.
White & Tucker vs. Rudolph.

WHITE AND TUCKER *vs.* THE ADMINISTRATOR.

Leave to sue the Administrator.

An application under the 8th Rule of Court for leave to sue the Administrator of the Government must be made in Court and not in Chambers.

Leave to sue the Administrator of the Government in an action for damages refused, where it appeared that the Administrator had proceeded bona fide, *believing that he was acting in the interests of the State, and where the applicants had a remedy, if any, against several other defendants.*

1879.
May 21.
White & Tucker vs. The Administrator.

This was an application in Chambers for leave to sue the Administrator of the territory, in an action for damages, jointly with Colonel Evelyn Wood, Colonel Bray, the Landdrost of Utrecht, and Lieutenant Crofton, in consequence of the forcible seizure of the stock of liquor belonging to the applicants. The circumstances connected with the seizure of the liquor are fully set forth in the application of *White and Tucker* vs. *Rudolph, ante* p. 116.

Cooper (with him *Cloete)* for the applicants: This is a mere formal application. Before the applicants can sue the Administrator of the Government, they must have the consent of the Judge of the High Court under Rule 8. The Administrator can be sued in the High Court. *Broom's Constitutional Law*, p. 631, *et seq.* *Hill* vs. *Bigge.*

Maasdorp (Attorney-General), *contra:* Where the Administrator, *bona fide* believing a certain state of things, has

1879.
May 21.

White & Tucker vs. The Administrator.

acted in the public interests, he should not be harrassed with legal proceedings.

KOTZÉ, J., ruled that the Administrator must be taken to have acted *bona fide* when he wrote the minute of 10th March, under which the liquor of applicants was ultimately seized. The Administrator believed he was acting in the public interest. Moreover, the Landdrost did not strictly adhere to the terms of the minute. The reason urged that this was a mere formal application cannot be accepted. The matter must be regarded as one of principle; and in order to sue the other defendants, supposing them to be tort feasors, no joinder of the Administrator was necessary. The application, according to Rule No. 8, should have been made in Court and not in Chambers. The application was accordingly refused with costs.

VAN BLERK *vs.* HOLLINS & HOLDER.

Security for Costs.

1879.
June 3.

Van Blerk vs. Hollins & Holder.

Maasdorp (Attorney-General) moved that the plaintiff, who resides in the Free State, be ordered to give security for costs. Action has been instituted for £61, being carriage claimed by plaintiff from the defendants.

Van Eck, for the plaintiff, opposed the application. Security for costs should have been asked before the defendants pleaded to the plaintiff's claim. *Van der Linden*, bk. 1 pt. 1, ch. 2, § 14.

The COURT ruled that security for costs must be given by the plaintiff, a *peregrinus*.

KLEINHANS *vs.* CRONJÉ.

Defamation.

In an action for damages, by reason that the defendant had stated the plaintiff had made a false declaration in the witness-box; Held, upon the evidence, that absolution from the instance must be granted.

1878
June 5.

Kleinhans vs. Cronjé.

Action for recovery of £500, as damages sustained by plaintiff, by reason that the defendant, "maliciously intending to injure the plaintiff, did on the 7th day of May, A.D. 1878, in the presence of several witnesses and on the Church Square, Potchefstroom, speak and say of and concerning the plaintiff the malicious, false, and defamatory words following, that is to say, 'that the plaintiff has made a false declaration,' meaning thereby the plaintiff had, contrary to the truth and his better knowledge, given evidence in a certain case between John Powell and Frederick Johannes Rademan," &c.

From the evidence of the plaintiff it appeared that during the trial of the case of Powell *vs.* Rademan, in which the plaintiff had been called as a witness, the defendant, on the plaintiff coming out of court, said to him, in the hearing of several bystanders, "Kleinhans, you have made a false declaration." In cross-examination the plaintiff stated that he thought "a false declaration is not equivalent to a false oath." He also admitted that after this he always shook hands with the defendant when they met, and continued on amicable terms with him. Jan Booysen, one of plaintiff's witnesses, stated that he heard the defendant say, "If Kleinhans declared that an exchange was according to beacons, then he has stated what is false." The brother of the plaintiff corroborated this evidence.

Kleyn, for the defendant, moved for absolution from the instance. It has not been proved that defendant maliciously stated the plaintiff had knowingly sworn falsely. Cronjé

1879. June 5. Kleinhans vs. Cronjé.

merely expressed his opinion that what had been stated by plaintiff in the witness-box was false in fact. The plaintiff himself so understood it, and subsequently always continued on friendly terms with the defendant. The innuendo laid in the summons is not borne out by the evidence. The words were not spoken *animo injuriandi* with the view of imputing perjury to the plaintiff. *Haupt* vs. *Elster*, 3 *Menz.* 39.

Van Eck, for the plaintiff. The defendant stated that the plaintiff had sworn falsely. What is this but an assertion that plaintiff had knowingly made a false oath? This clearly evidences malice on the part of defendant.

Buskes, on the same side, referred to *Addison on Torts*, p. 798, 4th edn.

The COURT held that the argument of defendant's counsel was borne out by the evidence, and granted absolution from the instance with costs.

REED *vs.* LEE.

Execution Creditor.—Mortgage of Movables.—Oral Evidence.

An execution creditor, who has seized movable property in execution in the hands of the debtor, will be preferred to a mortgagee, who claims the property by virtue of a mortgage bond, unaccompanied by delivery.

No oral evidence of the contents of a mortgage bond can be admitted, unless the absence of the bond has first been satisfactorily explained.

1879. June 17. Reed vs. Lee.

This appeal came on for hearing before the High Court at Zeerust. The appellant had obtained a judgment against one Van der Merwe on a written acknowledgment of debt for £75 with costs. The messenger of the Landdrost's Court of the district of Zeerust attached certain oxen in execution of the judgment. These oxen the respondent claimed to have been pledged to him by virtue of a mortgage bond,

and he accordingly appeared in opposition to the execution. The Landdrost decided in favour of the mortgagee's claim. The Record having been read,

1879. June 17. Reed vs. Lee

Cloete, for the appellant, maintained that the Landdrost should have given judgment in favour of the appellant (the execution creditor), and against the mortgagee, because—1st, the mortgage bond was an existing document, the absence of which in the Court below had not been explained, and no oral evidence as to its contents should have been admitted, but the bond itself should have been produced; 2nd, because there had been no delivery of the oxen to the mortgagee, the respondent.

The COURT allowed the appeal with costs upon both the grounds urged by counsel.

THE QUEEN *vs.* JOSEPH.

An informality, or irregularity, in the taking of a preliminary examination, affords no ground of objection for a prisoner not to plead to an indictment against him before the Jury.

The prisoner was indicted for having broken into the Post Office, and theft.

Cooper, before the prisoner was called upon to plead, raised the following exception:—The preliminary examination against the prisoner has been taken by Mr. Ayers, the Public Prosecutor, and not by the Landdrost of Rustenburg, as required by the Criminal Procedure Act, 1864, § 51. Mr. Ayres commenced the proceedings as Public Prosecutor, and afterwards sat as Landdrost in the case. When Mr. Ayres sat as Landdrost a gentleman, Mr. Schunke, was appointed Public Prosecutor contrary to law. He referred to *The Queen* vs. *Breytenbach*, decided by this Court in August, 1878, (*ante* p. 55.)

1879. June 17. The Queen vs Joseph.

The COURT ruled that whatever exception might be taken to the preliminary examination, the trial on the indictment

1879. June 21. — The Queen vs. Joseph.

against the prisoner must proceed before the Jury. The prisoner was to be tried not on the prelimary examination, but upon the *viva voce* evidence of witnesses to be called before the Jury by the Crown. This case was, therefore, distinguishable from the *The Queen* vs. *Breytenbach.*

De Hart *vs.* Steyn.

Foreign Bankruptcy.—Inadmissible Evidence.

De Hart, a debtor residing in the Free State, gave a promissory note payable at the Oriental Bank, Bloemfontein. His estate was subsequently adjudicated bankrupt in the Free State, and a trustee appointed. De Hart afterwards removed to the Transvaal, and was sued before the Landdrost of Pretoria on the promissory note by the payee, who was domiciled in the Free State, and had not proved any claim in the insolvent estate. The Landdrost admitted affidavits sworn in the Free State in evidence, and gave judgment against De Hart with costs. On appeal the Court reversed the judgment below with costs.

1879. July 8. — De Hart vs Steyn.

Appeal from the decision of the Landdrost of Pretoria.

The respondent, Steyn, sued the appellant in the Court below on a promissory note for £100, made by appellant in favour of respondent, or order, and by him indorsed in favour of the Oriental Bank Corporation. The note was made at Bloemfontein, in the Free State, on 30th October, 1876, and was payable at the Oriental Bank there, one month after date. The Landdrost admitted the affidavits of Steyn, the respondent, and the Manager of the Oriental Bank, in evidence. It also appeared from the affidavit of James Black Brown, that appellant's estate had been sequestrated as insolvent in the Free State, that he had not attended any of the meetings of his creditors, and that the trustee had received instructions to take steps against the appellant for fraudulent insolvency. Steyn did not prove any claim in the insolvent estate. The Landdrost

gave judgment in favor of the respondent, Steyn, with costs.

Maasdorp (Attorney-General), with him *Hollard*, for the appellant. The Landdrost should not have admitted the affidavits and have acted on them. He has given his judgment on inadmissible evidence. The appellant could not be sued in the Landdrost Court at Pretoria. The note was made in Bloemfontein, and was payable there. *Alexander & Co.* vs. *Leoni, Buch. Rep.* 1875, p. 79, is therefore distinguishable. The Court will recognize the insolvency of the appellant in the Free State, and hold that the respondent seeking redress in this territory is bound by the Insolvency Law of the Free State, where he resides (*Burge*, vol. 3, p. 924). Steyn has not proved his claim against the estate of the appellant in Bloemfontein, nor could he sue the appellant in the Court of his domicile, where the estate has been sequestrated. *Robson on Bankruptcy*, p. 418. *Phillimore, International Law*, vol. 3., p. 590-2. *Wheaton, International Law*, p. 120. The trustee in the insolvent estate of appellant is the proper party to sue on the note. Respondent can not seek redress in this territory to the detriment of the creditors generally. By so doing, and obtaining judgment and costs, he gets paid in full to the prejudice of the other creditors. *Story, Conflict of Laws*, § 405, § 408. *Burge*, vol. 3, p. 905; 8; 13; 22. The respondent has not given any explanation how he obtained possession of the note which is indorsed by him in favour of the Bank.

Cooper (with him *Cloete*) for the respondent: Oral evidence need not always be required by the Landdrost. In some instances affidavits may be admitted (Law No. 1, 1874, § 23, b.). The case of *Alexander & Co.* vs. *Leoni* is in favour of the respondent. Insolvency in the Free State is no bar to the action here against the insolvent. It is admitted that the Insolvency Law of the Free State is the same as that under Ordinance No. 6, of 1843, prevailing in the Cape Colony. Under §§ 124 and 127 of the Ordinance, a creditor has a remedy at law against the debtor, although he be insolvent and a trustee appointed.

1879. July 3. De Hart vs. Steyn.

Maasdorp (Attorney-General) in reply.

The COURT, upon the facts and argument of the Attorney-General, sustained the appeal and reversed the decision below with costs.

Ex parte RENS.

It is not desirable to have the evidence of the plaintiff in a suit for divorce taken on commission.

1879. July 3. Ex parte Rens.

Action had been instituted by the wife against her husband for divorce *a vinculo*.

Cooper moved for a Commission *de bene esse* to examine the applicant (plaintiff in the action), who resides at Potchefstroom.

The COURT ruled that regard being had to the nature of the suit, it was desirable that the applicant should give her evidence in Court, and directed that she appear for that purpose at the next sitting of the High Court at Potchefstroom.

WILLIAMS *vs.* YOUNG.

Conviction for Assault.—Action for Damages.

Although an action for damages for assault will lie, notwithstanding a previous criminal conviction of defendant for such assault; a Landdrost ought not to hear the civil action where the conviction is still pending in review before the High Court.

1878. July 4. Williams vs. Young.

This was an appeal from the judgment of the Landdrost of Potchefstroom. The Public Prosecutor proceeded criminally against Young for an assault on Williams, and

he was fined £5 by the Landdrost. This sentence was duly noted to be brought in review before the High Court. After conviction of respondent, the appellant took out a summons in which he claimed £10 damages for assault from Young, the respondent. An exception was taken against this summons that the criminal case was still pending in review by the High Court. The Landdrost held, that as the facts in the criminal case, still pending in review, were exactly similar to the facts in the civil action for assault, he ought not at that stage to try the case. From this decision the appellant, Williams, now appealed.

Cloete (with him *Hollard)* for the appellant.

Cooper (with him *Buskes)* for the respondent.

The COURT ruled that, although the appellant was not prevented from proceeding by civil action for damages, notwithstanding the conviction against respondent at the instance of the Public Prosecutor, the Landdrost had properly deferred hearing the civil case, until the High Court had first reviewed the criminal proceedings against respondent for assault. The appeal was accordingly dismissed. No order as to costs.

RUDOLPH *vs.* WHITE AND TUCKER.

High Court Proclamation.—Leave to Appeal to Privy Council.

The High Court Proclamation of 18th May, 1877, does not limit the right of appeal to the Privy Council to the case of a judgment in an ordinary civil suit or action, but extends it to any rule or order having the effect of a final and definite sentence.

The 35th Rule of Court requires that within one month, after the petition for leave to appeal has been lodged with the Registrar, recognizances shall be entered into, and security

given, by the party appellant to the party respondent, for the due prosecution of such appeal and for the payment of the costs thereof, in default whereof such appeal will be disallowed. Where, therefore, a petition for leave to appeal had been lodged with the Registrar on the 31st May, and was heard by the Court on the 1st July, no recognizances having been entered into in the meantime, the Court dismissed the petition.

1879.
July 1.
" 7

Rudo'ph vs. White & Tucker.

This was an application for leave to appeal to the Privy Council against the judgment of the Court given on 17th May last, in the matter of *White & Tucker* vs. *Rudolph* (*ante* p. 115), by which the present applicant was ordered to deliver up and restore to the respondents certain stock of liquor which had been seized by his order.

Maasdorp (Attorney-General) moved under the Proclamation of 18th May, 1877, establishing the High Court.

Cooper (with him *Cloete*) *contra*. The Proclamation cited gives no right to appeal in a case like *White & Tucker* vs. *Rudolph*. The Proclamation must be read in connection with the Rule of Court No. 34. The order made by this Court in *White & Tucker* vs. *Rudolph* was merely interlocutory, and not in any civil suit or action, as stated in the Proclamation. It was not a final judgment. It is only after action brought by White & Tucker for damages, and the judgment of the Court thereon, that there can be an appeal. *Van Leeuwen* (R. D. Law), bk. V., ch. 25, § 13. *Van der Linden* (Henry's edition), p. 386, 388-9. There was no right of property in dispute between the parties. It is admitted that the liquor seized is the property of White and Tucker. There has been a violation of the rights of respondents, for which they intend to bring an action. The amount of damage they have sustained has yet to be assessed. The Court may only award £20, instead of £500, which is the appealable amount. The value of the liquor seized cannot be taken into account. It may exceed £500, but that is not in dispute with the parties. *Still* vs. *Norden*, 2 *Menz.* 211. There is no allegation in the petition that there is any right in dispute of the value of £500.

The right of the Administrator to dispense with or alter the provisions of an existing law cannot be estimated.

Cloete, on the same side, urged that the right of appeal in the High Court proclamation is founded on the 50th clause of the Charter of Justice in force in the Cape Colony. This necessarily presupposes a civil suit or action, and not a mere order made in an extraordinary and summary proceeding, as was the case *in re White & Tucker* vs. *Rudolph*.

Maasdorp, Attorney-General, in reply: No authority has been cited to show that the applicant must wait until the respondents have brought an action for damages. They may be advised to take no further proceedings. The order of the Court is final. By it the present applicant was ordered to deliver up the liquor. This has been done; but the applicant feels himself aggrieved and is desirous of appealing against the order of this Court. He believes that by law he was justified in issuing the order under which the liquor was seized—in other words, that he had a right to make such an order, and he maintains that this right is worth £500 to him. *Van Leeuwen, Cens. for.*, p. 1, lib. 1, cap. 32 § 12, shows there is an appeal from all sentences and orders. The order of the Court is a final order under the doctrine of Van Leeuwen. *Cf. Voet*, 49, 1, 14. *Van der Linden* (Henry's edn.). p. 386-9. As to appealable amount, *Fisher's Digest*, p. 7050. The Court will take cognizance of all the facts and circumstances in the previous application of *White & Tucker* vs. *Rudolph*. In that application it appeared the liquor seized was over the value of £500.

Postea.

KOTZÉ, J.: It has been argued that the order of the Court in the matter of *White & Tucker* vs. *Rudolph* is a mere interlocutory order, and not a final or definite judgment, as required by the Proclamation of 18th May, 1877, and that, until an action is brought by White and Tucker against Mr. Rudolph for damages in having seized their stock of liquor and judgment given thereon, no appeal lies to Her

1879.
July 1.
" 7.
Rudolph vs. White & Tucker.

Majesty's Privy Council. I cannot adopt this view. It is not so much the form as the nature of the proceedings and of the order of the Court thereon that must be regarded. Although no action has been brought, or proceedings in a regular suit commenced and carried to a final determination, by White and Tucker against Rudolph, the order which the Court made, in the matter of the application for immediate redress against the forcible seizure of their property, and by which order Mr. Rudolph was directed to restore the property so seized, is as final and definite as can well be. The Proclamation does not limit the right of appeal to the case of a judgment in a civil suit or action, but extends the right of appeal to any rule or order having the effect of a final and definite sentence. I regret, however, that upon another ground I cannot grant leave to appeal. The 35th Rule of Court requires that within one month after the petition for leave to appeal has been lodged with the Registrar, recognizances shall be entered into and security given by the party appellant to the party respondent for the due prosecution of such appeal, and for the payment of the costs thereof, in default whereof such appeal will de disallowed. The petition for leave to appeal was filed on the 31st May, the judgment sought to be appealed against having been given on the 17th May. The petition came before the Court on the 1st July, but within the month, counting from the date of the lodging of the petition, *i.e.*, 31st May, no recognizances were entered into before me to prosecute the appeal and as security for costs, as required by Rule 35. This could have been done at Potchefststroom, or on my visit to Pretoria, on the 24th June. The provisions of Rule 35 have not been complied with, and I have no discretion but to follow the rule. I observe that Mr. Macpherson, in his book on *The Practice of the Privy Council*, p. 10, (2nd edn.), lays it down, that "an appeal cannot be admitted by the Colonial Court, unless the securities be perfected within the time specified by the charter. The Court has no discretion in the matter, and if it grants permission to appeal on the securities being perfected at a later date, the permission is invalid; and it has even been held, that it cannot acquire validity from any waiver or implied consent on the part of the respondent."

The present application must, therefore, be dismissed, although, of course, it is open to the applicant to present a special case on petition to the Judicial Committee of the Privy Council, who, in their discretion, may allow him to bring on his appeal. As the ground upon which the applicant is decided was not raised at the Bar, there will be no order as to costs.

1879. July 1. " 7 — Rudolph vs. White & Tucker.

BRODRICK *vs.* LEATHERN.

Rule 24.—*Notice of Bar.*—*Purging Default.*

Applicant, having entered appearance, failed to file pleas within the proper time under Rule 24. *He was repeatedly requested, after the lapse of such time, to file pleas, but neglected doing so. Notice of bar was thereupon served upon him, and a month afterwards he left the territory for England. Upon motion for leave to purge default and file pleas, the Court refused the application with costs.*

1879. July 17. — Brodrick vs. Leathern.

Application to purge default, and leave to sue under the following circumstances. Leathern, the respondent, issued a summons against Brodrick, the applicant on 30th April. Appearance was entered on 9th May, and in the ordinary course the defendant ought to have filed his pleas within six days after, but this he failed to do. He was repeatedly requested to file pleas by the attorney of the respondent, but did not do so. On 3rd June notice of bar was served on the applicant, who, together with his attorney, was in Pretoria at the time. Instead of at once applying for leave to purge his default under Rule 24, applicant delayed doing so, and left early in July for England, his attorney having about the same time left Pretoria temporarily for Natal. The application was supported by an affidavit of Mr. de Villiers, of the firm of Preller & de Villiers, attorneys, setting forth that Mr. Preller, as attorney for applicant,

1879. July 17. — Brodrick vs. Leathern.

was alone acquainted with the circumstances of applicant's defence to the action, and would shortly return from Natal.

Ford for the applicant.

Cloete for the respondent.

The COURT ruled that however much it might be disposed to grant leave to purge default under rule 24, no such leave could be given in the present instance. Having been repeatedly requested to file pleas, the applicant paid no attention thereto; and on the 3rd June notice of bar was served upon him. Applicant and his attorney were then both in Pretoria, and could have applied for leave to purge default and time to plead. They delayed doing so, and left the country. The application was accordingly refused with costs.

SIMPSON *vs.* LEMKUHL.

Proof of presentment of a promissory note at the place where it is made payable can not be allowed by affidavit in a case for provisional sentence. There must be a proper notarial certificate.

1879. July 17. — Simpson vs. Lemkuhl.

Hollard prayed for provisional sentence on a promissory note made by Lemkuhl, and payable at the office of C., whereof plaintiff is the legal holder. He proposed to put in an affidavit that the note was duly presented at the office of C.

The COURT ruled that the affidavit could not be admitted. A proper notarial certificate should have been framed and put in. Provisional sentence was according refused.

GOUWS *vs.* THE QUEEN.

Criminal Summons.—Non-appearance.

The applicants, having appeared in obedience to a criminal summons, applied for an extension of time. The Landdrost thereupon postponed the further hearing until a given day, when he would decide whether the application for time should be granted or not. The accused did not appear on the given day, when the Landdrost refused the application for time, and convicted the applicants; Held, that their non-appearance on the given day did not deprive them of the right to appeal against the conviction, and that § 108 of the Criminal Procedure Act did not apply.

1879.
July 17
July 22.
—
GOUWS vs. The Queen.

This was an application for leave to appeal from the sentence passed upon the applicants (father and son) by the Landdrost of Wakkerstroom. Applicants had been charged by the Public Prosecutor for the district of Wakkerstroom with having committed the crime of "defamation of character." The applicants appeared in person in the Court below on 27th May, and evidence for the prosecution was taken. At the conclusion of the case for the Crown the applicants prayed for a postponement, and the Court thereupon postponed the further hearing of the case until the 3rd June, when the Court would decide whether further time should be given to the accused as prayed. On the 3rd June the applicants did not appear, and the Landdrost having decided that further time could not be granted at once proceeded to convict and sentence them to a fine of £7 10s. each with costs. The fine and costs were paid by the applicants, who, however, desired to appeal against the finding of the Landdrost, but on the 10th June the Landdrost Clerk, who was also the prosecutor, refused them leave to appeal under § 108 of the *Crim. Procedure*, which provides that "sentences pronounced by default, or against persons who have not appeared before the Court, cannot be appealed from."

1879.
July 17.
" 22.
Gouws vs. The Queen.

Cooper, for the applicants. The right to appeal in this case is given by § 106 of the *Crim. Procedure Act*, which provides that any person sentenced to pay a fine may appeal against the sentence, provided he has first paid the fine and costs.

Maasdorp, Attorney-General, for the Crown. The section relied on does not apply. The accused did not appear on the 3rd June, and consequently the case must be governed by § 108 of the *Crim. Procedure Act*.

Cooper in reply. The applicants did appear on 27th May, when evidence for the prosecution was taken. The Landdrost should have acted under section 8 of Law No. 1, 1874 and not have convicted the accused in their absence.

Postea (July 22nd).

KOTZÉ, J. The *Criminal Procedure Act*, § 108, provides that all sentences which have been pronounced against persons who are in default (*by verstek*), or who have not appeared to answer the charge, cannot be appealed from. The same statute, § 77, in accordance with an elementary principle of criminal law, requires that all proceedings shall take place in the presence of the accused, § 108, therefore, can only apply where an accused person, having been duly summoned to appear, disobeys the process of the Court and refuses or does not appear. This is the meaning of the term *verstek*, or "in default," used in the section. Although § 103 makes some provision in cases of this kind, it seems that under that section no warrant can issue against the person summoned unless there appear, after evidence heard, to be at least a *prima facie* case made out against the accused to the satisfaction of the Attorney-General or Landdrost. This has been amended by § 8 of what is commonly called the *New Criminal Procedure Act of* 1874. In the present instance the accused did appear in obedience to the summons. They were not, therefore, in default on 27th May, but were they such on the 3rd June, so as to bring them within the provisions of § 108? I think not. The Landdrost postponed the case until that day, when he would decide whether the application of the accused for

1879.
July 17.
" 22.

Gouws vs. The Queen.

further time should be granted or not. Although the accused ought to have been present on the 3rd June, they may have been under the impression that the only matter the Landdrost would decide on that day was their application for extension of time, and that in the event of the application being refused they would be called upon to appear on an appointed day to receive sentence. Had this course been followed, and the accused, when called upon, had not appeared, then I think section 108 would have deprived them of their right to appeal. The course I have suggested was, however, not adopted, and the simple non-appearance of the accused on the 3rd June does not, under the circumstances, bring them within the provisions of section 108. Leave to appeal will therefore be given*

LEATHERN *vs.* BRODRICK.

Where the defendant had been barred from pleading, and the Court had refused him leave to purge his default, his Counsel was at the trial permitted to cross-examine the Plaintiff's witnesses.

1879.
July 28.

Leathern vs. Brodrick.

This case having been called on, and Ford appearing for the defendant,

Cloete, for the plaintiff, objected to this course, on the ground that the defendant had been barred from pleading. He referred to *Luck* vs. *Owen*, 3 *Menz.*, 456. *Stoll* vs. *Kraus*, 3 *Menz.*, 549.

Ford suggested that previous to the case of *Luck* vs. *Owen* the practice of the Supreme Court was different. The defendant can be called now, and the moment he is called counsel appears for him.

The COURT held that however deirable it might be that a rule should be promulgated in terms of the cases cited

* The appeal was heard on 1st August, when the Court quashed the conviction, on the ground that the record did not show that the accused had been called on to plead.—ED.

1878. July 28. — Leathern vs. Brodrick.

from *Menzies*, still, as there is no existing rule preventing the defendant's counsel from cross-examining the witnesses, the Court will allow him to do so, the defendant having entered appearance, although subsequently barred from pleading (vide *Brodrick* vs. *Leathern, ante* p. 139).

THE QUEEN *vs.* UMZANDOZA.

After a prisoner has pleaded to an indictment, a criminal trial can not be postponed, on the ground of the absence of material witnesses.

1879. September 11. — The Queen vs. Umzandoza

Indictment for manslaughter against the prisoner in the High Court sitting at M. W. Stroom. The prisoner having pleaded *not guilty*, and the witnesses when called not appearing,

Cloete, for the Crown, applied for a postponement of the case on the ground that two material witnesses, Sarah and Umkaai, were not present. He put in an affidavit sworn by himself to this effect, and cited *Crim. Procedure*, § 95.

Cooper, as *amicus curiæ*, referred the Court to § 75 of the *Crim. Procedure*.

The COURT ruled that the application for postponement should have been made before the prisoner was called on to plead. (*Voor den aanvang van het verhoor.*)

THE QUEEN *vs.* JANSE VAN RENSBURG.

Non-appearance of Accused.—Recognizance Estreated.

1879. September 12. — The Queen vs. Van Rensburg.

Indictment for assault with intent to do grievous bodily harm. The accused was out on bail, and having been thrice called, did not appear to take his trial

1879.
Sept. 12.

The Queen vs.
Rensburg.

Cloete, for the Crown, put in the bail bond executed by the accused and his surety, and prayed that the recognizance be estreated and a warrant issued for the apprehension of Van Rensburg under § 92, *Crim. Proced.*, 1864. The indictment and notice of trial were duly served on the accused.

The COURT ordered the recognizance to be estreated, both as regards the accused and his surety, and granted a warrant for the arrest of Van Rensburg.

Postea (Sept. 13). The Court, upon application, granted a writ of attachment and execution against the movable and immovable property of Van Rensburg and his surety.

Ex parte DEECKER.

An affidavit must be duly signed by the Justice of the Peace before whom it purports to have been sworn.

1879.
Sept. 23.

Ex parte
Deecker.

In this application the COURT ruled that an affidavit, which was not signed by a Justice of the Peace, before whom it purported to have been sworn, could not be received.

THE QUEEN *vs.* BOTHA.

Criminal trial postponed owing to the absence of material witnesses for the prosecution.

1879.
October 7.

The Queen vs.
Botha.

The prisoners, W. and A. Botha, were indicted for robbery before the High Court sitting at Potchefstroom.

Cloete, for the Crown, moved for a postponement of the case on the ground that material witnesses for the prosecution were absent. He read an affidavit by himself in support of the application, and cited § 95 *Crim. Proced.*

Kleyn, for the prisoners, opposed.

1879. October 7.
The Queen vs. Botha.

The COURT granted a postponement of the case until the next sitting at Potchefstroom. The accused to give fresh bail for their appearance.

Ex parte DARGON.

Lunatic.—Provisional Curator.

A curator ad litem *will be appointed by the Court to assist an alleged lunatic in a suit brought with the view of having him declared lunatic. A provisional curator may also be appointed to manage his property in the meantime.*

1879. October 8.
Ex parte Dargon.

Application to have Willem Abraham Pretorius, brother-in-law of applicant, declared lunatic, and a curator appointed over his person and property. The petition of Dargon, which set forth that Pretorius was *non compos mentis*, was supported by a certificate from Dr. Poortman to the same effect.

Van Eck for the applicant.

The COURT appointed Advocate Buskes *curator ad litem* to assist the alleged lunatic in a suit to be instituted against him, to shew cause why he should not be declared of unsound mind, &c. The Court also appointed a provisional curator to manage his estate and property.

NYSHENS *vs.* NYSHENS.

The signature of a Minister to a certificate of marriage, contracted in the Cape Colony, must be duly proved.

1879. October 14. " 15.
Nyshens vs. Nyshens.

Action for divorce *a vinculo*, on the ground of adultery by the wife. Evidence having been led,

Kleyn (with him *Cloete*) put in a document purporting to

1879.
October 14.
" 15.
Nyshens vs. Nyshens.

be a certificate signed by the Rev. Van der Riet of Oudtshoorn in the Cape Colony, by whom the parties had been married in 1865.

The COURT ruled that the certificate could not be received, unless there was evidence to prove the handwriting and signature of the Rev. Van der Riet. Accordingly, on the following day, a witness was called, who proved the signature, and the Court granted a degree *a vinculo*.

STAMP *vs.* REX.

Lessor and Lessee.—Cancellation of Lease.—Damages.

Where a lessee ceased to pay rent, allowed the premises leased to go to ruin, and had abandoned them; Held that the lessor was entitled to a cancellation of the lease and to damages.

1879.
October 30.
Stamp vs. Rex.

Action by a lessor against the lessee for damages under the following circumstances. In December, 1876, the plaintiff leased to the defendant, by written agreement, certain three mills, wool-washery, and dwelling house, situate near the Mooi River at Potchefstroom, for the period of ten years. The defendant entered into possession of the premises leased, which were in good repair. In June, 1878, the defendant left the premises leased, keeping, however, possession of the keys. The plaintiff, thereafter, found that one of the mills and the miller's cottage had been pulled down, and the beams, window-frames, and doors removed. The chimney-pieces of the dwelling-house, and some shelving, were also missing. The machinery of the mills had been allowed to get out of repair, and a mill-wheel had been taken away. The place was described by the witnesses as a lot of ruins. The lessee had also ceased to pay rent.

Maasdorp (Attorney-General), with him *Preller*, for the

1879.
October 30.
—
Stamp vs. Rex.

plaintiff. The defendant has virtually abandoned the premises. The Court may, under the general prayer for relief in the summons, order the cancellation of the lease, and authorize plaintiff to take possession of the premises, otherwise the damage will continue. It may be a question whether the Court will grant full damages, or merely such damages as will act as a penalty. *(Woodfall's Landlord and Tenant,* p. 561, 11th edn.)

No appearance for the defendant.

KOTZÉ, J.: The lessee has not kept the premises in repair. He has permitted them to go almost entirely to ruin, and has, in fact, abandoned the use and occupation under his lease. Through this conduct of the lessee, the premises leased have been materially damaged. Although the summons does not ask for a cancellation of the lease, yet under the circumstances disclosed by the evidence, and the general prayer "for such other relief as the Court may deem fit," contained in the summons, I will order the lease to be cancelled. There will, therefore, be judgment for the plaintiff for £500, as damages, with costs; the lease to be cancelled.

CURATOR OF VAN DER MERWE'S ESTATE *vs.* VAN DER MERWE.

Antenuptial Contract.—Claims of Husband's Creditors.

The Placaat of Charles V., 1540, *art.* 6, *applies to all antenuptial contracts by which property is settled upon, or secured to, wives by their husbands, whether merchants or not.*

No antenuptial contract can secure to the wife any of the husband's property in competition with his creditors, although the husband at the time of such contract was in solvent circumstances.

1879.
July 29.
" 30.
" 31.
Nov. 11.

Curator of Van der Merwe's Estate vs. Van der Merwe.

Action by the curator of the estate of H. P. Van der Merwe to have certain portions of erf No. 109, in the town of Rustenburg, claimed by Mrs. Van der Merwe as her property under an antenuptial contract, declared an asset in the sequestrated estate of her husband, the said H. P. van der Merwe. The portions of erf No. 109 were described in the antenuptial contract as the property of the wife, but the evidence showed that the ground had been purchased by H. P. van der Merwe previous to the marriage, and no transfer thereof had been made and registered to, and in the name of, Mrs. van der Merwe. In 1878, H. P. van der Merwe first obtained transfer of the land, and he then gave instructions to have transfer passed in the name of his wife. This was, however, prevented by an interdict obtained on 8th October, 1878, by the Cape Commercial Bank, a creditor of H. P. van der Merwe. The estate of H. P. van der Merwe was subsequently, on the 28th January, 1879, sequestrated under the Roman Dutch Law, at the instance of certain creditors, before the passing of the present Insolvent Ordinance. The facts are fully set forth in the judgment below.

Maasdorp (Attorney-General), with him *Meintjes*, for the plaintiff. It is stated in the antenuptial contract that the land in question is the property of Mrs. Van der Merwe. The evidence conclusively refutes this statement. There is no transfer in favour of Mrs. Van der Merwe. The question is not one between husband and wife, but between the husband and his creditors. *In re Bauman* (*Standard and Mail*, 29 Nov., 1867.) The claim of the wife, if the land was promised her before marriage, must be postponed until the creditors of the husband have been satisfied. *Thurburn* vs. *Steward*, *L. R.* 3, *P. C.* 345; *Chiappini's case*, *Buch. Rep.*, 1869, 143; *Steyn* vs. *Steyn's Trustees*, *Buch. Rep.*, 1874, p. 17, and *Buch. Rep.* 1873, p. 105; *Buskes* vs. *Russouw's Executor*, *Buch. Rep.*, 1875, p. 19. The moment the husband got transfer of the ground the dominion vested in his curator, for the husband was insolvent at the time. *Harris* vs. *Trustees of Buissini*, 2 *Menz.*, 19. *Maynard* vs. *Gilmer's Trustee*, 3 *Menz.*, 116.

Cooper (with him *Cloete*) for the defendant. In view of

1879.
July 29.
" 30.
" 31.
Nov. 11.

Curator of Van der Merwe's Estate vs. Van der Merwe

marriage, Van der Merwe gave his intended wife the land as a gift for her benefit. The antenuptial contract says the erf is the property of the wife, and the antenuptial contract was duly registered before the Landdrost of Rustenburg. The land was bought by the husband for £26 17s., and the gift to the intended wife was not, therefore, made in fraud of creditors. The cases cited by counsel for the plaintiff proceed upon the ground that at the time of the donation the husband was in insolvent circumstances. At the time of the marriage in 1867, H. P. Van der Merwe was perfectly solvent. His difficulties only commenced in 1878.

Maasdorp (Attorney-General) in reply. Whether the husband was solvent or not at the time of the gift, makes no difference. *Buch. Rep.*, 1869, pp. 111 and 12. *Burge*, vol. 1, p. 313, p. 300.

Cur. adv. vult.

Postea (November 11th).

KOTZÉ, J.: This is an action by the curator of the sequestrated estate of Hendrik Petrus van der Merwe, to have it declared that certain parcels of land, being Nos. 15 and 16 of erf No. 109, Rustenburg, claimed by Mrs. Van der Merwe (born McDonald) as her property under an antenuptial contract, form portion of the insolvent husband's sequestrated estate. The facts are briefly these:—

Hendrik Petrus van der Merwe and Emily McDonald intermarried at Rustenburg in July, 1867. An antenuptial contract was executed by, and between, the intending spouses on the 23rd July, 1867, by which it was provided—

1st. That the spouses should bring into the marriage all their property, an inventory of which is to be annexed to the contract antenuptial;

2nd. That the property so respectively brought in, together with inheritances, legacies, and donations in whatever manner acquired, shall be excluded from community;

3rd. That either spouse shall not be liable for the

debts of the other, contracted before marriage, or *stante matrimonio ;*

4th. That the wife shall, at her election, on dissolution of marriage, have the right of choice of profit and loss accruing during the marriage, or of contenting herself with her own property brought in at the time of marriage, or acquired by her during coverture.

The inventory attached to the foot of the antenuptial contract specifies that the intending wife declares to bring in to the marriage the undermentioned moneys and goods as her property :—1. The erven 17 and 18 of the large erf No. 109, situate in the district of Rustenburg; 2. Household furniture, as five tables, ten chairs, bedding complete, together with kitchen utensils, &c.; 3. Five cows. There is a clause in the original antenuptial contract, stating that the bride shall bring in a sum of £1,000. This clause was erased. How, or why, it ever came to be inserted in the contract has not been clearly explained, for Mrs. Van der Merwe never at any time possessed £1,000. The evidence of the Landdrost of Rustenburg has satisfied me that the erasure was *bona fide*, and made at the time when the parties executed the contract antenuptial, as appears from his own endorsement at the foot of the original antenuptial contract, and also from the entry in his Register or Record Book. The antenuptial contract was duly registered by the Landdrost on 23rd July, 1867, in accordance with the local practice prevailing at the time.

The two portions, viz., 15 and 16 of No. 109 (for it was subsequently discovered that the Nos. 17 and 18 mentioned in the antenuptial contract are incorrect), did not at the date of the marriage belong to Mrs. Van der Merwe. It is beyond dispute that in 1864 Hendrik Petrus van der Merwe bought these parcels of land, and in due course paid for them. No transfer was, however, given him by the vendors, until in September, 1878, they instructed their agent, Mr. Du Toit, to pass transfer to the husband. Owing to some error in the description of the correct numbers of these part-erven, the Registrar of Deeds refused to register the transfer. The error was rectified, and the husband directed his attorneys to pass transfer of the erven in favour of his wife.

1879.
July 29.
„ 30
„ 31.
Nov. 11.

Curator of Van der Merwe's Estate vs. Van der Merwe.

The deeds of transfer were accordingly drawn out by them in favour of the wife, but on proceeding to have the transfer registered, they discovered that an interdict had been obtained on the 8th October, 1878, at the instance of the Cape Commercial Bank, a creditor of H. P. van der Merwe, restraining him from transferring, or otherwise alienating, or mortgaging the erven in question. On the 28th January, 1879, the estate of H. P. van der Merwe, the husband, was, at the instance of certain other creditors, judicially placed under sequestration, and Mr. Celliers, the plaintiff, appointed curator of the estate. After the marriage, H. P. Van der Merwe and his wife went to reside on the portions Nos. 15 and 16. A house was built by the husband on this piece of ground. Mrs. Van der Merwe, in order to assist her husband, who was a carpenter by trade, in supporting themselves and the children of the marriage, engaged in dressmaking, and also later on started a bakery. With money so earned by her, she improved and made certain additions to the house built by her husband. Under these circumstances, the plaintiff contends that the two erven, with the buildings thereon, are the property of the insolvent husband, and form portion of the assets of his sequestrated estate; whereas the wife maintains that she is entitled to the land and buildings in preference to her husband's creditors. The question was very ably argued by the learned counsel on both sides, and it remains for the Court now to state, and apply the law to, the facts of the case.

By the Placaat of the Emperor Charles V., 1540, Art. 6, it is provided that the wives of *merchants* shall be postponed to the creditors of their husbands as regards property given or secured to them by their husbands in an antenuptial contract. The Privy Council in *Thurburn* vs. *Steward, L. R.* 3, *P.C.* 478 (commonly called *Paterson's case*) decided that this Placaat is portion of the Roman Dutch Law; and as such, therefore, it is in full force in this Territory. But do the provisions of this statute apply to property given, or secured, to the wife in an antenuptial contract by a husband who is not a merchant? If the question merely depended on the proper construction of the Placaat, I would have no hesitation in holding that it only extends to traders or merchants; for the sixth section specially refers to them

alone; whereas other sections of the statute, *e.g.*, § 2, containing provisions in protection of creditors, legislate generally concerning merchants and other debtors. Sound policy also would seem to indicate that it is unreasonable to set aside or permit the creditors of a husband to attack a *bona fide* provision by antenuptial contract made by him in favour of the wife when in perfectly solvent circumstances, and no extensive interpretation should be given to the plain grammatical language of this statute. It is, however, no longer open to the Court to question the extensive interpretation which has been given to the words of this section of the Placaat by learned Judges and commentators. Paterson's case, although it decided that § 6 of the Placaat is a part of the Roman Dutch Law, is not precisely in point here, for there the insolvent husband was a merchant. So in like manner, in the case of *Trustees of the S. A. Bank* vs. *Chiappini*, the insolvent, the husband, was engaged in mercantile business. In *Chiappini's* case, however, which was decided by the Supreme Court of the Cape Colony in 1856 *(Buch. Rep.*, 1869), the learned Judges expressed a clear opinion that the provisions of the Placaat, § 6, apply generally to all antenuptial contracts by whomsoever executed. It is true this expression of the Court's opinion amounts to a mere dictum, and as the question now before me is as important a one as a court of law can be called upon to decide, I have carefully examined all the most approved authorities on the subject. An examination of these authorities shews that the view of the law taken by the Judges in *Chiappini's* case is correct. Thus *Grotius* (II., 12, § 17), without referring to the Placaat, lays it down that a wife may not derive any benefit from her husband's property, nor even receive any compensation therefrom, until creditors have first been satisfied. *Schorer*, in his note on this passage of *Grotius*, expresses a similar opinion. So *Voet* (24, 3, § 25) says that a surviving spouse can not claim the *dowary* or benefit promised her by antenuptial contract, until the creditors of her deceased husband have first been satisfied *(dimissis defuncti creditoribus)*. *De Haas*, in his note to the *Censura Forensis* of *Van Leeuwen* (iv. ll. § 5), emphatically states that the sixth section of the Placaat applies to the provisions of all antenuptial contracts in favour

1879.
July 29.
" 30.
" 31.
Nov. 11.

Curator of Van der Merwe's Estate vs. Van der Merwe.

of married women made by their husbands, whether merchants or not; and he gives instances where the Supreme Court of Holland has postponed the claims of a wife, under an antenuptial contract, to those of the husband's creditors, although the husband was not a merchant. *Neostadius de pact. ante nupt. obs.* 10, also mentions several cases to the lik effect. The jurists in the *Rechtsgeleerde Observatien,* vol. 3, *obs.* 38, approve of the doctrine laid down by *Grotius,* and would make it appear, by reference to certain ancient charters and *costuymen,* that the Placaat of Charles V., § 6, is merely declaratory of the existing law of Holland. This may be so, but certainly some of the *costuymen* cited by them relate only to antenuptial contracts made by husbands, who were *insolvent* at the time, to the prejudice of their creditors. In such cases, the elements of fraud and undue preference usually enter into the question, and no statute is needed to make such antenuptial contracts ineffectual as against the husband's creditors. Chief Justice Bynkershoek, indeed, advocates the view that the wife's claim to *douary,* or any benefit promised by the husband in an antenuptial contract, is to be considered as *æs alienum* in respect of the creditors of the husband, but his opinion is controverted by the jurists in the *Rechtsgeleerde Observatien* (*vide Supplement to Obs.* 32, printed in vol. iv. *in fin.*), *Van der Kessel, Th.* 242, and *Van der Linden,* I. 3, § 4, n. 6, two of the most recent writers on the Roman Dutch Law, apply the provisions of the Placaat generally to the property of all husbands, whether engaged in trade or commerce or not. In a recent case, *Steyn* vs. *Trustees of Steyn* (*Buch. Rep.,* 1874, p. 16, the Supreme Court of the Cape Colony expressly approved and followed the dictum laid down in *Chiappini's* case. "By that judgmen," says Denyssen, J., "the doctrine as established by the Placaat of Charles V., the law of the land, is, *first,* that no antenuptial contract can secure in favour of the wife any of the husband's property in competition with his creditors; and, *secondly,* that the wife's own property can be secured against the husband's creditors by antenuptial contract." It appears from the argument of defendants' counsel in that case that Steyn, the insolvent, was a trader, but the question whether the provisions of the Placaat, § 6, extended

1879.
July 29.
„ 30.
„ 31.
Nov. 11.

Curator of Van der Merwe's Estate vs. Van der Merwe.

generally to persons other than merchants, was prominently before the minds of the learned Judges, who concurred in the dictum laid down in *Chiappini's* case.

In the present case the erven in question, which the antenuptial contract states are the property of the wife, have been proved by the clearest evidence never to have been transferred to her. The dominium is in her husband, Hendrik Petrus van der Merwe, and I must accordingly pronounce the two erven, with the buildings thereon, to be portion of his sequestrated estate. No doubt this decision is a hard one as regards Mrs. van der Merwe, who, with money earned by her own industry, assisted her husband not only in support of the family, but, as her children grew up, made additions and improvements to the house originally built by the husband. The law is, however, too well settled, and whatever claim she may have against her husband's estate, that claim can not be recognised in a competition with his creditors.

As to the argument addressed to me, that this antenuptial contract was entered into by the husband when in perfectly solvent circumstances, and, therefore the wife's claim to the erven must be preferred to those of creditors, *Paterson's* case shows that it is wholly immaterial whether the husband was, or was not, in solvent circumstances at the date of the execution of the contract antenuptial. There must be judgment for the plaintiff; the costs to come out of the estate.

VAN DER MERWE *vs.* TURTON AND JUTA.

Separate Property of Wife.—Sale in Execution.

Although a wife can not derive, by antenuptial contract, any benefit out of her husband's estate to the prejudice of his creditors, she may protect her own property by antenuptial contract against any claim on the part of such creditors.

Where, therefore, the property of the wife, secured by antenup-

tial contract, of which the defendants had notice, had been seized and sold in execution of a judgment against the husband, the Court held that an action for damages at suit of the wife lay against the defendants.

1879.
July 31.
Nov. 4.

Van der Merwe vs. Turton and Juta.

The plaintiff, Mrs. Van der Merwe (who was the defendant in the previous case of *Curator of Van der Merwe's Estate* vs. *Van der Merwe*), brought an action against the Manager of the Cape Commercial Bank and the Sheriff for the wrongful seizure and sale of certain furniture, being her separate property under an antenuptial contract. The defendants had notice of the antenuptial contract.

Cooper (with him *Preller*) for the plaintiff.

Mansdorp (Attorney-General), with him *Meintjes*, for the defendants.

KOTZÉ, J.: This is an action for damages brought by Mrs. Van der Merwe against the General Manager of the Cape Commercial Bank and the Sheriff, for the wrongful seizure and sale in execution of certain chattels, the property of plaintiff. The plaintiff is the defendant in the preceding case. The Sheriff, on the 7th December, 1878, in execution of a judgment of this Court for £482 10s., in favour of the General Manager of the Bank against Hendrik Petrus Van der Merwe, by his deputy, attached certain movables, which, it is alleged, belong to Mrs. Van der Merwe as her separate property by antenuptial contract. Mrs. Van der Merwe and her husband stated this to the Sheriff at the time, and made out a list of the goods and chattels which the wife claimed as her own property. They also made affidavits in support of their statement. The list was handed to the Sheriff, who communicated with the attorney of the Bank, the judgment creditor. Thereupon the attorney of the Bank gave the Sheriff a bond of indemnity, and instructed him to proceed with the sale of the chattels, which took place on the 20th January, 1879, and from the vendue roll it appears that the goods sold realised £35 12s. 1d. This was before the sequestration of the husband's estate as insolvent. Now, when Mrs. Van der Merwe claimed the chattels attached as her own property

by antenuptial contract, and furnished the Sheriff with a list, the correctness of which was sworn to in an affidavit, nothing was easier than for the judgment creditor, or the Sheriff, to have ascertained whether any antenuptial contract between the plaintiff and her husband had been executed and duly registered. A reference to the Register or Record Book, in the Landdrost's Office at Rustenburg, would clearly have shewn this. By the antenuptial contract, Mrs. Van der Merwe retained, as her sole and separate property, "household furniture, viz., five tables, 10 chairs, bedding, kitchen utensils, &c." These good were sold in execution together with other movables, the property of her husband. Although a wife cannot derive, by antenuptial contract, any benefit out of her husband's estate to the prejudice of his creditors, she may, nevertheless, protect her own property by antenuptial contract against any claim on the part of such creditors. What the precise value of the chattels wrongfully sold is, does not appear. The vendue roll shows a total of £35 12s. 1d., and some of the witnesses state the goods realised fair prices. In awarding the plaintiff damages for the tortious seizure and sale of her property, the Court cannot confine its attention merely to the amount as shewn by the vendue roll, but must calculate the actual loss and inconvenience sustained by the plaintiff. She, herself, swears that money can scarcely replace the inconvenience she suffered through the sale of her furniture and kitchen utensils, and I think that substantial justice will be done by awarding her £100 as damages and costs.

FERGUSON *vs.* PRETORIUS AND OTHERS.

Trespass.—Public Meeting.

An action will not lie against defendants for trespass of cattle, the property of persons who attended a public meeting upon the invitation of the defendants.

1879.
November 12.

Ferguson vs. Pretorius and others.

The plaintiff, the widow Ferguson, instituted an action for damages against M. W. Pretorius and M. J. Viljoen, in their capacity as chairmen, and S. T. Prinsloo, J. P. Maré, P. J. Joubert, M. Vorster, H. Schoeman, and S. J. P. Kruger, as members, and W. E. Bok, in his capacity as secretary, "of the so-called committee of the people." The summons set forth that in the month of March, 1879, and at the request of all or some of the defendants, certain inhabitants of the Transvaal Territory, calling themselves "the meeting of the people," congregated together in the neighbourhood of the plaintiff's farm for the purpose of holding a political meeting; that they remained so assembled for the period of one month; that during the said period the cattle and horses of some of the people attending the said meeting broke down the fences and enclosures of the plaintiff's land, and destroyed the crops growing thereon, &c.

The defendants pleaded, *inter alia*, the following exception:—"That the summons is vague and insufficient in law, inasmuch as it does not allege that the trespasses complained of were committed by the said defendants, or any of them, or by their authority, or by their servants or cattle."

Jorissen (with him *Cloete*) in support of the exception, was not called on.

Hollard, contra: The summons is good. It states that the trespasses were committed during the month of March, and subsequently. The defendants have been summoned in their capacity as a committee. As such, they are liable for trespass by cattle, the property of persons who, on the invitation of the defendants, attended the meeting.

The COURT held that the summons did not disclose a *prima facie* right of action against the defendants. Exception allowed with costs.

FINEGAN *vs.* FINEGAN.

Absence of husband.—Birth of Child.—Adultery.—Condonation.

Where a husband had been absent from home and returned to his wife, who, within six months of such return, gave birth to a full-born child; Held proof of adultery by her with some person unknown, and a decree for divorce a vinculo *was accordingly granted.*

Where a husband attempted to have connection with his wife by putting his hand under her clothes, to which invitation she did not respond; Held that this per se *did not amount to condonation.*

1879.
November 13.
" 14

Finegan vs. Finegan.

Action for divorce *a vinculo*. The parties were married at Rustenburg in 1869. They had no issue. On the 7th May, 1878, the plaintiff, who is a mason by trade, joined Captain Ferreira's corps as a volunteer in the operations against the chief Sekukuni. In June of the same year, the plaintiff was wounded, and continued in hospital until 27th January, 1879. On his discharge from hospital, the plaintiff proceeded to his home at Rustenburg. On the 24th June, 1879, the defendant was delivered of a female child, which, according to the evidence of a surgeon, exhibited every sign of full maturity. Upon the birth of the child the defendant told plaintiff that one P. was its father. The plaintiff left the house, and instructed his attorney to institute proceedings for a divorce. Some weeks after, in consequence of a communication from the Landdrost, the plaintiff went to see his wife, who then told him one O. was the father of her child. On a subsequent occasion, the plaintiff went again to the house to fetch a few articles. He then had tea with his wife and attempted to have connection with her, but she was not then in a fit state for the purpose. It was not proved who was the father of the child.

Hollard for the plaintiff. The husband was absent from home from 7th May, 1878, until 30th January, 1879. On

1879. November 13. " 14. Finegan vs. Finegan.

24th June, 1879, the wife gave birth to a full-born child. The inference is irresistible that the wife has committed adultery with some person or persons unknown. *Van der Linden*, bk. 1 ch. 17, § 4, n. 2.

Meintjes for the defendant. The birth of the child cannot be disputed, but the husband condoned the offence. He visited his wife after he had discovered her guilt, and tried to have connection with her. *Browne on Marriage and Divorce*, p. 98, 3rd edit; *Browning*, p. 143.

Hollard, in reply: Condonation should have been specially pleaded. The plaintiff merely put his hand under his wife's clothes. This does not constitute condonation. Forgiveness of the offence was never in the mind of the plaintiff. *Browning on Marriage and Divorce*, p. 141-2; *Fisher's Digest*, p. 4489; *Van Leeuwen*, bk. 1 ch. 15, § 1; *Browne on Marriage and divorce*, p. 97, 3rd edit.

Postea (Nov. 14th.)

The COURT held the adultery proved by the birth of the bastard issue, The putting of his hand under the wife's clothes was not, *per se*, sufficient evidence of condonation on the part of the husband. It was a silent invitation, or offer, to have connection, which was not accepted by the wife (*vide Bishop on Marriage and Divorce*, vol. 2, § 47). A decree of divorce, *a vinculo*, was accordingly pronounced.

COMPTON *vs.* WILLIAMS.

A summons based on an account, charging compound interest, is not on that ground bad in law.

1879. November 14. Compton vs. Williams.

Action of debt on an account. Exception that the summons is based on an illegal account charging compound interest, and is therefore bad.

Cloete, in support of the exception, referred to *Van der Linden*, pp. 218-19.

1879.
November 14.

Compton vs. Williams.

Maasdorp (Attorney-Generol) *contra*; If the plaintiff has charged more than he is entitled to, his claim as to the excess will be disallowed. The plaintiff has not practised usury. He did not stipulate for more than that to which by law he is entitled.

The COURT overruled the exception with costs.

CAPE COMMERCIAL BANK *vs.* SCHRÖDER & Co.

Unincorporated Banking Company.

An unincorporated joint stock banking company cannot sue through its general manager.

Where a promissory note is specially indorsed to the local manager of a particular branch of an unincorporated banking company or order, he can maintain an action on it in his own name.

1879.
November 19.
" 20.
" 21.
1880.
January 12.

Cape Commercial Bank vs Schröder & Co.

John Turton, as General Manager of the Transvaal Branches of the Cape Commercial Bank, sued the defendants, Heinrich Schröder, William McLaren, and John Pagan, formerly trading together as Schröder & Co., on an overdue promissory note, made by Van der Merwe and Bodenstein in favour of Schröder & Co., and by them indorsed in blank. The note was subsequently specially endorsed by S. K. du Toit to the "Manager of the Cape Commercial Bank, Pretoria Branch, or order."

The defendants McLaren and Pagan raised the following exception or plea in abatement: "That neither the Cape Commercial Bank, nor the branches thereof in this Territory, being incorporated according to the laws of the Transvaal, the said John Turton is not entitled to sue in the capacity as General Manager of the said branches of the Bank aforesaid, but that, even if the said Bank has an action against the said defendants, all the shareholders in the said Bank should have been plaintiffs, wherefore the said defendants pray that the summons may be dismissed with costs."

1879.
November 19.
" 20.
" 21.
1880.
January 12.

Cape Commercial Bank vs. Schröder & Co.

For the convenience of witnesses from a distance the Court ruled that the evidence should first be taken, leaving it open to counsel to argue the exceptions after the witnesses had been heard. In support of the plaintiff's case a notarial document was put in, purporting to have been executed, on the 26th March, 1878, by David Andries de Villiers and Jacob Johannes Hofmeyr, of Capetown, in their capacity as Trustees of a certain banking institution carried on in Capetown under the name of the Cape Commercial Bank, they being duly authorised thereto by the Board of Directors of the said banking institution. By this notarial document the Trustees gave authority to John Turton, General Manager of the different branches in the Transvaal of the said banking institution, to be the true and lawful agent and representative of the said branches, and for that purpose, either in his own name as such General Manager, or in the names of the Trustees aforesaid, to sue for and recover all sums of money due to the different branches of the said Bank, upon promissory notes, bills of exchange, bonds, &c. A similar authority to sue was also put in, dated 24th October, 1879, and purporting to have been executed by Jacob Johannes Hofmeyr and Wilhelmus Johannes van der Veen, of Capetown, in their capacity as Trustees of the said Bank, upon authority for that purpose given by the Directors.

Maasdorp (Attorney-General) for the plaintiff: It is sufficient in the summons to aver the capacity in which the plaintiff sues, and then to produce proof of such capacity at the trial. This has been done. The powers of attorney put in give Turton authority to sue in his own name or as General Manager of the Bank. *Grant on Banking*, p. 559, 3rd edn. In reality the Bank is suing, but through its General Manager. *Story on Notes*, § 127. It has been pleaded that plaintiff cannot sue as General Manager; but it is just because the Bank is not incorporated that Turton may sue as General Manager. *Paterson* vs. *Pearson*, *Buch. Rep.*, 1875, p. 49. *Lindley on Partnership*, vol. 1, p. 507, 3rd. edn. There is no Roman-Dutch authority to shew that the plaintiff cannot maintain an action on the note against the defendants.

1879.
November 19
" 20.
" 21.
1880.
January 12.

Cape Commercial Bank vs. Schröder & Co.

Ford for the defendants, McLaren and Pagan: The plaintiff, as a servant, comes into Court representing a company, not a single shareholder of which is known in the Transvaal. There is no one to whom the defendants can look if they obtain judgment in their favour. The Bank is an unincorporated joint stock company, and can not recover moneys due to it in this way. *Lindley on Partnership,* vol. 1, p. 508–9, 511, 485, 482. Joint stock companies were unknown to the Roman Dutch Law. In the Cape Colony the practice is for the cashier to sue personally on a note as actual holder, where the Bank is unincorporated. A special Act of the Legislature in the Cape Colony is necessary to enable a banking company to sue through its officer. (He also referred to *Grant on Banking,* p. 560, and *Erskine's Institutes,* vol. 2, p. 747–8, note 133, and p. 749, note a.)

Cooper for Schröder.

Maasdorp (Attorney-General) in reply.

Cur. adv. vult.

Postea (January 12th).

Kotzé, J.: The plaintiff is the General Manager of a joint stock banking company or copartnership not incorporated by Act of Parliament. The doctrine of English law, relied on by the defendants McLaren and Pagan, is correctly stated in Mr. Justice Lindley's work on Partnership (vol. 1, p. 483 and 508-9, 3rd edn.) An unincorporated company labours under several disadvantages; one of which is that, in suing for the recovery of debts due to the company, all the shareholders must join as co-plaintiffs. In a recent case on the subject *(Gray* vs *Pearson, L. R.* 5, *C. P.* 569) it was held that the Manager of a Society, for the Mutual Assurance of Ships belonging to its members, could not maintain an action against a member for premiums due from such member, or for moneys paid by the Manager out of the funds of the Association in respect of such member's share of losses due to other members. The Manager was appointed by a power of attorney, which authorized him, on

1879. ovember 19. " 20. " 21. 1880. January 12.

Cape Commercial Bank vs. Schröder & Co.

behalf of the members, and in their several and respective names, to demand and sue for all sums which should become due and payable for premiums and contributions. Mr. Justice Willes said: "This is in effect an attempt to substitute a person as nominal plaintiff, in lieu of the person whose rights have been violated. One of the latest attempts of the kind was *Hybart* vs. *Parker*, where it was sought to enforce an agreement between the adventurers in a Cost-book Mine, that unpaid calls should be recovered as a debt due from the defaulting shareholder to the purser. The first sentence of the argument on behalf of the defendant in that case clearly shewed the fallacy of the attempt. 'This (said the learned counsel) is an attempt on the part of the shareholders in a Cost-book Mine, without the aid of an Act of Parliament, to appoint a public officer to sue, or be sued, on their behalf.' The Court, adopting that view, gave judgment against the right of the purser to sue."

On referring to *Hybart* vs. *Parker* (4 *Jur., N. S.* 265), I find that Williams, J., in delivering judgment, said: "Here there has evidently been an endeavour by an agreement to give a power to sue in violation of the law, which is no more binding than if there had been an agreement to the effect that if a person be sued, there should be no plea to the action but that of payment. It is clear that this action can not be maintained. The plaintiff is nothing more than a servant suing on behalf of his employers."

If such be the law as regards suing a member of an unincorporated company, *a fortiori*, does it apply to the mode of suing third parties who are not members of the joint partnership. Hence, Chief Justice Best, pronouncing the unanimous opinion of the Common Pleas, says; "We think that the members of a firm can not by agreement give an authority to any one of them to bring an action in his name against persons not members of the firm." (*Radenhurst* vs. *Bates*, 3 *Bing.*. 469). Such being the doctrines of English law on the subject, are they to govern the present case? The question the Court has to decide is one of mercantile law, a branch of jurisprudence of comparatively modern growth, and this no doubt is the reason why there is an almost total absence of authority in our Roman-Dutch books on the point. Under these circumstances, the local

1879.
November 19.
" 20.
" 21.
1880.
January 12.

Cape Commercial Bank vs. Schröder & Co.

law directs that the Court must be guided by the principles prevailing generally in South Africa. In the Cape Colony the doctrine of law that an unincorporated company can not sue through its Manager or Secretary has been clearly recognised. I find several legislative enactments in that Colony, incorporating Joint Stock Associations and co-partnerships, and enabling them to bring and defend actions in the name of the Manager or Secretary of the Company. One of the earliest statutes to this effect was Ordinance No. 8 of 1839, empowering the Board of Executors to sue and be sued in the name of their Secretary. Next we have the South African Association Incorporation Act, and, amongst others, also the Eastern Province Bank Act of 1868, which, in its 60th Section, provides that the Trustees, under authority of the Directors, may sue, and be sued, on behalf of the Company. In the Cape Colony, then, express legislative authority is necessary to enable a joint stock banking co-partnership to bring an action by its public officer; clearly showing that in the absence of such legislative sanction, an action brought by, and in the name of, the Manager or Secretary could not be sustained.

I do not find in the reports any express judicial decision of the Supreme Court on this point, but in *Patterson* vs. *Pearson* (*Buch. Rep.*, 1875, p. 49) there is an expression of opinion by the Court which would seem to shew that the law prevailing in the Colony is considered settled, and is similar to the doctrine of English law which I have already stated.

Here, in the Transvaal, the Legislature has also passed a short Act (No. 6 of 1874) authorising the Government to issue letters of incorporation to companies on payment of £25, and further subject to such regulations and conditions as the Executive Council may see fit to impose. In upholding the exception, I wish to point out that I am deciding this question not merely upon the authority of the English law, and the law in the Cape Colony, but upon the general principle that the proper person to sue is he whose right has been infringed. If the action had been brought in the name of the *local* Manager of the Bank at Pretoria, regard being had to the form of the special endorsement, no objection could have been urged against such a course. (*Story*

1879. November 19, " 20 " 21. 1880. anuary 12.

Cape Commercial Bank vs. chröder & Co.

on Prom. Notes, § 127). There must, therefore, be judgment for the defendants McLaren and Pagan on the exception, with costs. As to the defendant Schröder, who appeared by separate counsel, there will be no order as to costs, for no exception or plea in abatement was filed in his behalf.

KIRSTEIN *vs.* GRONUM.

An application to strike an appeal case off the Roll refused, where the parties had agreed that the appeal should be heard after the expiration of the three months allowed by the Rules of Court.

1879. ecember 11.

Kirstein vs. Gronum.

This was an application to have a certain case in appeal, *Gronum* vs. *Kirstein*, struck off the roll. The respondent noted an appeal from the decision of the Landdrost of Zeerust, and was ready to prosecute the appeal to hearing within the three months required by the Rules of Court. By an arrangement, however, between the attorneys on both sides, the hearing of the appeal was postponed until a day subsequent to the expiration of the three months. The respondent did not, however, bring his appeal on for hearing on that day.

The COURT ruled that the applicant, having departed from the Rules of Court requiring prosecution of the appeal within three months, could not take advantage of them again in this summary manner, and directed that the appeal be heard.

JOHNSTON *vs.* KEISER.

Provisional Sentence.—Minor.

Where defendant gave a promissory note for value and acted as if he were a major, the Court granted provisional sentence on the note against him, notwithstanding his affidavit stating that he was only eighteen years old.

1879. December 12. — Johnston vs. Keiser.

Claim for provisional sentence on a promisorry note for £650, made by defendant in favour of J. W. Honey, and by him indorsed in blank, whereof plaintiff is the legal holder. In his affidavit the defendant alleged that the note had been given by him to Honey, his brother-in-law, as accommodation, and that he was only eighteen years of age, and carrying on no business of his own. From the affidavits filed by the plaintiff, however, it appeared that the note had been given in payment of a farm, and that the defendant had executed other documents as if he were a major.

Preller, for the plaintiff, put in the note and prayed for provisional sentence.

Hollard contra. The defendant is a minor, and not liable on the note.

KOTZÉ, J.: The signature of the defendant is not denied. He held himself out as a major. He had signed deeds of purchase and sale without any assistance from his guardian. Let defendant go into the principal case, if so advised, and prove what he alleges in his affidavit. Provisional sentence must be granted against him with costs.

Ex Parte BOK.

Interdict.

An application for an interdict will be refused, where no clear right is established by the applicant.

1880. January 13. — Ex parte Bok.

Application for an interdict restraining N. J. R. Swart, Esq., Treasurer-General, from alienating or mortgaging his property, pending an action for damages for malicious arrest and false imprisonment to be instituted against him by applicant. From the affidavit of applicant it appeared that he had been arrested on a sworn information of Mr. Swart, charging him with treason, and his house had also been searched. The applicant further stated that he was

1880. January 18. — Ex parte Bok

innocent, and verily believed the verdict of the jury would be in his favour.

Jorissen for the applicant.

The Court held that the applicant's right to an action, and his ultimate success in such action, depended on several contingencies, and that no case for the granting of an interdict had therefore been established.

Ex parte Fox, James, and Jones.

Interdict.—§ 55 *Civil Procedure Act of* 1874.

Upon an affidavit by a creditor, setting forth that a debtor was by his conduct jeopardizing the interests of such creditor, an interdict will be granted against the property of the debtor under § 55 *of the Civil Procedure Act,* 1874.

1880. January 19. — Ex parte Fox, James, & Jones.

This was an application in Chambers for a provisional interdict restraining one B. Van der Spuy from alienating or disposing of his movable property, pending an action to be brought against him by the applicants for £43. The affidavits set forth that Van der Spuy is indebted to the applicants in the sum of £43, that he has no fixed abode, and had expressed his intention of alienating his movable property as soon as applicants take proceedings against him for the recovery of the £43. Van der Spuy is not possessed of any immovable property in the territory.

Hollard, in support of the application, referred to the *Grondwet,* § 167, and the *New Civil Procedure Act of* 1874, § 55, which provides that "upon application by a creditor, supported by an affidavit setting forth that the debtor is by his acts and conduct jeopardizing the interests of the creditor, an interdict may be granted against the property or person of the debtor."

KOTZÉ, J., granted an interdict as prayed, and directed the applicants to file their summons within 48 hours, and to proceed to trial on the first day of the next term.

1880. January 19.

Ex parte Fox, James & Jones.

MEARS *vs.* LEATHERN.

Re-opening of Case.—Perjury.

Where the applicant alleged that one J., a witness, had at the trial committed perjury, and prayed for a re-opening of the case after judgment had been given, the Court refused the application, because the evidence of J. had been materially corroborated by L., another witness, and there was no allegation that L. had sworn falsely.

1880. February 12.

Mears vs. Leathern.

Hollard moved to have the case of *Leathern* vs. *Russell*, in which judgment had been given by the Court in favour of Leathern, re-opened under the following circumstances. In December, 1877, the Court had given judgment in favour of Leathern against Russell for the cancellation of a mortgage bond passed by Leathern in favour of Mears, and by him ceded to Russell, on the ground that the amount of the bond had been paid and satisfied. Mears was at the time absent in England, and on his return to Pretoria he was obliged to satisfy Russell in the amount of the bond, together with the costs incurred by him in the action for cancellation of the bond. It was now alleged that Julien, a witness for the plaintiff in *Leathern* vs. *Russell*, had committed perjury when giving his evidence in the case.

The COURT refused the application on the ground that Julien's evidence at the trial had been materially corroborated by that of Leathern, and there was no allegation that Leathern had sworn falsely.

ARCHER *vs.* VAN RENSBURG.

Where the applicant had obtained a judgment with costs against the respondent, the Court directed the Sheriff, who had certain funds in hand belonging to the respondent, to pay out to the applicant the amount of his judgment with costs.

1880. February 12. — Archer vs. Van Rensburg.

This was an application to have the sum of £100, being the amount of a judgment obtained by Archer against Van Rensburg, and the taxed costs, paid out of certain funds in the hands of the Sheriff, which funds are the surplus proceeds of the sale of Van Rensburg's immovable property, sold in consequence of the estreatment of his recognizances in *The Queen* vs. *Van Rensburg (ante,* p. 144).

Cloete for the applicant.

The COURT directed the Sheriff to pay out to applicant the sum of £100, together with the taxed costs as prayed and the cost of this application.

TURTON *vs.* SARGEANT AND OTHERS.

Promissory Note not made to Order.—Provisional Sentence.

Where a Promissory note, not originally made to order, was indorsed by the defendants, the Court granted provisional sentence against them and the maker.

1880. February 12. — Turton vs. Sargeant and others.

Meintjes prayed for provisional sentence on a promissory note made by W. Sargeant in favour of Williamson & Co., but not to their order. The defendants Williamson & Co., and Palframan, indorsed the note. *Thompson, Watson, and Co.* vs. *Malan,* 2 *Menz.,* 270. *Byles on Bills,* p. 147, 12th edn.

No appearance for defendants.

The COURT granted provisional sentence.

LUBBE *vs.* GENIS.

§ 39 *Civil Procedure Act*, 1874.

1880. February 17. — Lubbe vs. Genis.

Application to make absolute a rule *nisi* granted against the Registrar of the Landdrost Court of the district of Bloemhof, to shew cause why he should not be ordered to sign and issue a writ of execution against the immovable property of one G., against whom judgment had been given in favour of the applicant.

The COURT refused the application, on the ground that according to § 39 Civil Procedure Act, 1874, the rule should have been applied for against the Landdrost, and not against the Registrar.

KING *vs.* HENDERSON.

Where an attorney acted as an ordinary agent, the Court refused to make absolute a rule nisi *against him for a specified account.*

1880. February 17. — King vs. Henderson.

Application to make absolute a rule *nisi*, calling upon Henderson, an attorney, to shew cause why he shall not be ordered to render a proper specified account to the applicant of all his dealings and certain moneys with regard to the purchase and sale of a certain farm Naauwhoek.

Cooper for the applicant.

Hollard for the respondent.

The COURT refused the application, as it appeared that Henderson acted in the matter as an ordinary agent, and was not employed as an attorney.

The Queen *vs.* Fleischman and Katryn.

The evidence of a witness admitted against a native woman with whom he was living.

1860. February 28. — The Queen vs. Fleischman and Katryn.

During the trial of this case, on an indictment for murder, a witness, Mapeppa, was called, who stated that the prisoner Katryn was his wife. He was simply cohabiting with her, and had not been married to her according to Kafir custom. Upon objection by prisoner's counsel, who cited § 121 *Crim. Procedure*,

Kotzé, J., ruled that the evidence of the witness was admissible. The terms *husband* and *wife* denote a legal and conjugal relationship between the parties. In the present instance there was no such relationship.

The Queen *vs.* Sepana.

Is the evidence of a native woman, prisoner's second wife, admissible against him?

1860. February 26. — The Queen vs. Sepana.

In this case the prisoner had been indicted for murder, and, before closing the case for the Crown, the Attorney-General intimated that there were two female witnesses who are wives of the prisoner, and submitted that as the Court could not recognise polygamy, the evidence of the second wife ought to be admitted against prisoner.

Kotzé, J., thought that if the prisoner had married both women according to Kafir law and custom the second wife was as much his wife by that law and custom as the first wife; and doubted whether, in the absence of any evidence to the contrary, the second wife should be admitted as a witness against the prisoner.

As the Attorney-General did not press the point, no decision was given.

The Queen *vs.* Smith.

On an indictment for theft, the Court refused to amend the indictment by substituting 8th December, 1879, for 8th March, 1879.

1880. February 26. — The Queen vs. Smith.

The prisoner was indicted for the theft of a horse. The indictment set forth that prisoner had stolen the horse on 8th March, 1879. The Attorney-General now applied to have the indictment amended by substituting 8th December, 1879, for 8th March, 1879.

On objection by prisoner's counsel, the Court sustained the objection, upon the ground that only an amendment not exceeding *three* months can be allowed as to date.

The Queen *vs.* Davis.

The deposition of an absent witness, who had not been bound over to appear at the trial under § 51 of the Criminal Procedure, rejected by the Court.

1880. February 26. — The Queen vs. Davis.

In this case the Court ruled that § 128 of the *Criminal Procedure* must be strictly interpreted, and that, where it is proposed to put in at the time the deposition of an absent witness, given during the preliminary examination, it must be shown to the Court that the whereabouts of the absent witness, who has left the country, are unknown, and that proper steps have been taken, under § 51, to secure the attendance of such witness at the trial.

Jacobs *vs.* The Queen.

Recognizance.—Condition.

Where the applicant did not comply with the condition of a recognizance, held that the recognizance was properly estreated.

Affidavits can not be received to supplement or add to the record of proceedings in a Court of Landdrost. Such affidavits are, however, admissible in support of an application to send the record back to the Landdrost on the ground of incompleteness.

The Court does not entertain moral claims.

1880.
March 5 and 6.

Jacobs vs. The Queen.

This was an application to have a ruling of the Landdrost of Middelburg, by which he declared certain recognizances entered into by Jacobs estreated, set aside. The applicant, Jacobs, was charged with assault, and entered into a recognizance on the 9th October, 1879, for the sum of £200, upon condition that if he apppeared after receipt of proper notice the recognizance was to be void, otherwise to remain in full force and effect. On the 18th October, the Public Prosecutor of Middelburg caused a summons to be served on Jacobs by the Messenger of the Landdrost Court, calling on him to appear on the 29th October. The summons was served at Jacobs' residence on his son-in-law, Jacobs being absent in the Free State. On the 29th October Jacobs did not appear, and, on application to the Public Prosecutor, the Landdrost declared the recognizance forfeited. Two days later, however, Jacobs put in an appearance.

Jorissen, for the applicant, read certain affidavits to shew the record of the proceedings before the Landdrost was incomplete and to supplement the record. He maintained that Jacobs had acted *bona fide*, and that he had not purposely absented himself. By not appearing he did not commit any contempt, and as soon as the summons was brought to his notice he put in an appearance.

Morcom (Attorney-General) for the Crown: This is an appeal from an interlocutory order. The affidavits cannot be received. The applicant must rely on the record, which shews that he entered into a personal bail-bond under a condition, and that he voluntarily broke that condition. In strict law the action of the Landdrost is binding, and the only remedy is for the applicant to petition the Administrator.

1880.
March 5 and 6.

Jacobs vs. The Queen.

Jorissen, in reply: The Court can correct the irregularity of any proceedings in the Court of Landdrost, § 7 *Crim. Proced.*, 1864. No order was served on Jacobs to shew cause why the recognizance should not be estreated.

KOTZÉ, J.: Assuming the applicant has acted *bona fide* and went to the Free State on lawful business and appeared immediately the summons was brought to his notice, he has nevertheless broken the condition in the bond. There is nothing in the bond that if Jacobs had a reasonable excuse to give for his non-appearance after notice, the bond would not be forfeited. The written document must have effect as it is, and there exists no reason for interfering with the ruling of the Landdrost. The affidavits read are inadmissible. They cannot be received for the purpose of adding evidence to the record, which evidence is not on the record itself. If the record is incomplete, application should have been made to have the record sent back to the Landdrost to have it made complete, and in support of such an application affidavits would be admissible. If the applicant or his counsel conceives there exists a moral claim for redress, a petition can be presented to the Administrator, but the Court cannot entertain moral claims.

CLOETE *vs.* THE GOVERNMENT.

An advocate is liable to pay a licence or personal tax under Law No. 2, 1871.

1880.
March 12.

Cloete vs. The Government.

Appeal from the decision of the Landdrost of Pretoria, by which the appellant, a barrister and an advocate of the High Court, was ordered to pay an annual licence of £15 to the Government under Law 2, 1871, § 5.

The appellant, in person, contended that the High Court Proclamation, 1877, under which he was admitted, exempts a practitioner who is a barrister, and as such was admitted as an advocate of the Court, from paying an annual licence under the terms of Law No. 2, 1871, § 5. This law refers

1880. March 12 — Cloete vs. The Government.

to practitioners who are both advocates and attorneys, *i.e.*, who practice in the dual capacity.

Morcom (Attorney-General), in support of the ruling of the Landdrost: The appellant is an advocate of the High Court. By Law No. 2, 1871, every advocate is subjected to the payment of £15 as annual licence or tax. The High Court proclamation merely refers to the terms upon which barristers and advocates from elsewhere will be admitted by the Court. It does not exempt them from any taxes placed by the law here upon the status of advocate.

The COURT disallowed the appeal. No order as to costs.

BAKER *vs.* SAUNDERS.

Volunteer Corps.—§ 4, *Mutiny Act.*—§ 13 *Articles of War.*

Where the appellant became the member of a volunteer corps for the period of six months at 5s. per diem, and the corps was suddenly disbanded by order of the senior military officer in command at Pretoria; Held:

1*st.*—*That the Court had jurisdiction to try an action instituted by the appellant for damages for breach of contract.*

2*nd.*—*That* § 4 *of the Mutiny Act, and* § 13 *of the Articles of War, did not apply to the appellant.*

3*rd.*—*That although no special and substantial damage had been proved by the appellant, he was nevertheless entitled to nominal damages.*

1880. March 12. " 13. July 8. — Baker vs. Saunders.

Appeal from the decision of the Landdrost of Pretoria upon the following facts. After the disaster at Isandhlwana, in January, 1879, several young men, principally clerks in the Civil Service and in mercantile employ, offered their services to the local Government to proceed to the Zulu

border, or elsewhere, as a Mounted Volunteer Corps. The offer was duly accepted by Sir Theophilus Shepstone, the Administrator, but His Excellency thought it desirable that for a time the corps should remain in Pretoria. A form of oath was drawn up, apparently in the handwriting of the respondent, who was Superintendent of Volunteers at the time, as follows:—

"I, the undersigned, do hereby solemnly swear that for the term of six months from the date hereof, I will, as a member of the corps known as the 'Pretoria Horse,' be faithful and bear true allegiance to Her Majesty the Queen, her successors or representatives, according to law, and that I will obey all lawful commands of the officers set over me. So help me God.

"Pretoria, 12th February, 1879."

Several gentlemen subscribed this oath, and after the corps known as the "Pretoria Horse" had been properly established, the appellant, Baker, joined and subscribed the above oath on the 10th March, 1879. The corps elected its own officers, although the officers and men of the "Pretoria Horse" were under the control and direction of the Commandant of the Transvaal, received their pay from the Imperial Government, and were generally subject to the military authority. The appellant discharged his duty as a volunteer until, on the 31st April, 1879, the Commandant, Colonel Rowlands, issued the following district order:—"The services of the Pretoria Horse being no longer required, this corps will be dismissed from the 23rd instant inclusive. The horses and saddlery, the camp equipment and Government stores, are to be returned to-morrow." The appellant, who was not a clerk when he joined the corps, together with some other men, appeared to have been dissatisfied at this disbandment of their corps, and the respondent was sent by Colonel Rowlands the day after disbandment to go to these men and offer them service in any volunteer corps they might select. On arriving at the tents of the Pretoria Horse he found Baker (the appellant) there, and offered him service in any other volunteer corps, which offer the appellant declined to accept. The appellant, some time after, brought an action against the respondent, in his capacity as Superintendent of Volunteers, for £35, for loss and damage sustained by reason of the premature disband-

1880.
March 12.
" 18.
July 8.

Baker vs. Saunders.

ment of the Pretoria Horse, "being pay for 140 days, at five shillings per diem."

An exception was taken that the Court below had no jurisdiction, but this was over-ruled by the Landdrost, who, after hearing the evidence, gave judgment for the respondent (the defendant below), on the ground that no substantial damage had been sustained by the appellant.

Hollard, for the appellant: The appellant made an agreement with the Government to serve in a particular corps, at so much per day, for the period of six months. Having been suddenly dismissed, without just ground, he is entitled to damages or compensation. (*Van Leeuwen, Rom.-Dutch Law*, bk. 4, ch. 22, § 2; *Grotius*, 3, 19, § 54; *Story on contracts*, § 1308, § 1334.) The appellant is at least entitled to the pay for the time which he would still have served had he not been dismissed. He has not merely lost his 5s. per diem for six months, but also his rations and his lodging. The respondent cannot rely on the offer to give the appellant employment in another corps. By the contract the appellant was not bound to serve in any other corps. The Pretoria Horse was a corps specially raised under special circumstances, and could choose its own officers, &c., which is not the case with other corps. If the military authorities had intended to draft the men of the Pretoria Horse into another corps, they could have secured that right by inserting a clause to that effect in the contract. This they, however, omitted to do. (*Story on Contracts*, § 1478, *in notis*.

Ford, for the respondent: The action is wrongly brought. The Courts of Law have no jurisdiction. It is admitted the Pretoria Horse was an Imperial corps, and the remedy is by petition to a Special Court Martial or the Secretary of State for War. If actions are allowed against the authorities for the pay of soldiers and volunteers, discipline would be severely shaken. The *Mutiny Act*, 1 Vict., c. vii., §§ 1, 2, 4, and 105; the *Articles of War*, §§ 13, 178, 188, and 190,

[KOTZÉ, J.; But, where the appellant has ceased to be a volunteer, do you contend that even then he is precluded

by the Act and the Articles of War from bringing an action for damages for sudden dismissal ?]

1880.
March 12.
" 13.
July 8.

Baker vs. Saunders.

The damages sought to be recovered are really the pay due to the applicant, and which he would have earned, as a volunteer. (§§ 12 and 13 *Articles of War*. There is no condition that the Pretoria Horse should remain intact as a separate corps. The appellant has not proved any substantial damage. He was offered suitable service in another corps. This he declined to accept. (*Mayne on Damages*, p. 8, 3rd edn., pp. 53, 117, and 191.) The appellant, if entitled to any damages, can at most recover the actual loss sustained.

Hollard, in reply: The respondent noted no appeal on the exception of non-jurisdiction, which was decided against him in the Court below. He cannot, therefore, now raise it on appeal. (§ 151, *Grondwet*; 3, *Menz.* 366.) The appellant, being no longer a volunteer, is not bound by the Mutiny Act and the Articles of War. He cannot avail himself of the remedies given to soldiers by these enactments. His only remedy is to sue in a court of law.

Cur. adv. vult.

Postea (July 8th).

KOTZÉ, J.: It was objected in the Court below that the ordinary legal tribunals of this territory have no jurisdiction in the present case, and that the appellant's remedy was by petition to the Secretary of State for War. A decision of the Cape Supreme Court, in *Sands* vs. *Cooper* (3, *Menz. Rep.*), was cited in support of the plea to the jurisdiction. The Landdrost over-ruled the objection, holding (and, in my opinion, correctly) that the decision in *Sands* vs. *Cooper* did not apply to the present case. After hearing the evidence, he gave judgment for defendant (now respondent), on the ground, apparently, that no special or substantial damage was proved or sustained by appellant.

A very important question was raised on this appeal—viz., whether the ordinary Courts of Law in this Province have jurisdiction to entertain an action for loss of service

1880.
March 12.
July 18.
July 8.

Baker vs. Saunders.

brought by a volunteer whose corps has been disbanded before expiration of the time up to which he was engaged to serve. The general rule of the common law is, that the servant, or employé, has a right of action against the master, or employer, if the latter prematurely, and without any misconduct of the former, terminates the relation subsisting between them. It is incumbent upon the respondent to show that this ordinary right, given by the common law, has been taken away in the present instance by some legislative enactment, or other instrument having the force of law. In *Dawkins* vs. *Lord Paulet* (*L. R.* 5. *Q. B.*), a case which, to a great extent, turned upon the 12th section of the Articles of War, Lord Chief Justice Cockburn, in the course of an able and eminently constitutional judgment, says:—" But whatever may be the right view of this matter with reference to considerations of policy, a grave question appears to me to present itself as to how far a court of law is warranted, in the absence of positive law or previous decision, in refusing redress in a case of admitted wrong, and in which the right of action would otherwise be undoubted, simply because on grounds of public convenience the action as between the particular parties ought not to be allowed." The onus now lies upon the respondent to satisfy me that the appellant cannot exercise a right of action given to every servant by the common law. To shew that the action would not lie, several sections of the Mutiny Act and articles of War were cited. It is not necessary to refer to them all, and I will confine myself entirely to section 4 of the Mutiny Act and the 13th section of the Articles of war. It may be doubtful whether the appellant, when he joined the Pretoria Horse, became a *soldier* within the meaning of the 4th section of the Mutiny Act. I wish to guard myself against expressing any opinion on this point, and will, for my present purpose, assume that the appellant did come under the 4th section of the Act. If so, then the Articles of War applied to him while the character of soldier attached to him. Now, section 13 of the Articles of War, which is the only article relied on to which I need refer, provides:—" If a non-commissioned officer or soldier shall think himself wronged in any way affecting his pay or clothing *by his*

captain, or other officer commanding the troop or company to which he belongs, he is to complain thereof to the commanding officer of the *regiment*, who is hereby required to summon a *regimental* court of enquiry, for the purpose of determining whether such complaint is just; from the decision of which court of enquiry either party may, if he thinks himself still aggrieved, appeal to a General Court Martial; and such court shall hear and determine the merits of the appeal, and after determining the same, and after allowing the appellant to shew cause to the contrary, by himself and by witnesses, if any, may either confirm the appeal or dismiss it without more, or may, if it shall think fit, pronounce such appeal groundless and vexatious, and may thereupon sentence such appellant to such punishment as a General Court Martial is competent to award." It is clear this article has not the effect in the present case of precluding the appellant from bringing his action. The article just quoted contemplates the case where the relation of soldier and officer is still existing. In the present instance the military relation was put an end to by the disbandment of the corps to which appellant belonged. Where is the remedy which this section provides? How can the appellant apply to the commanding officer of the regiment when the regiment no longer exists? and how, therefore, shall the regimental court of enquiry be constituted? Again, how can there be an appeal to a General Court Martial from a regimental court, when the regiment is not *in esse?* and how can the power of punishing a vexatious appellant be enforced? Moreover, the appellant does not complain of any wrong done him by his own captain or other officer commanding the troop to which he belonged; he complains of the premature dismissal of his corps by direction of the Commandant of the Transvaal. It is manifest Article 13 has no application here, even assuming that it would have held while the corps known as the Pretoria Horse was still intact. The machinery provided by the article for redress no longer exists, and the common law right, if it was ever taken away, revives and can be enforced by action in a court of justice. The objection to the jurisdiction of the courts of law to determine the present case cannot be sustained, and I must hold with the Land-

1880.
March 12.
" 13.
July 8.

Baker vs Saunders.

drost that the action well lay. The only other point is the amount to which the plaintiff (now appellant) may be entitled. On this part of the case, judgment was given in favour of the respondent (defendant below); but although I agree with the Landdrost for the reasons stated by him, that no special or substantial damage has been proved, it is clear the appellant is entitled to some, even if it be but nominal, damages. Under all the circumstances of the case, considering the appellant could have obtained immediate employment in some other volunteer corps, which he refused to accept when offered him, I think he should not be allowed more than one day's pay *i.e.*, five shillings. The judgment of the Court below must, accordingly, be varied into one for the plaintiff (now appellant) for five shillings, each party to pay his own costs. There will be no order as to costs of this appeal.

VAN EEDEN *vs.* KIRSTEIN.

Action by Married Woman.—Exception.

The general rule of Roman-Dutch Law is that a married woman must, in law, proceed by, or with, the assistance of her husband. Where, therefore, the plaintiff, a married woman, sued, as executrix of her first husband's estate, for money due to the estate, without the assistance of her second husband; Held, upon exception to the summons, that the exception was well taken.

1880.
May 14.
Sept. 9.

Van Eeden vs Kirstein.

Action by Cornelia Carolina Christina Petronella van Eeden, born Van Tonder (widow of the late Antonie Johannes Gronum), "as well in her capacity as executrix testamentary of the estate of her late husband, Antonie Johannes Gronum, as for herself, &c.," for the recovery from the defendant of certain sums of money, amounting in all to £563 12s. 3d., collected by defendant on behalf of the estate of the late A. J. Gronum, and the further sum of £223, being money advanced to the defendant by the said estate.

The defendant took the following exception: "That the plaintiff, having married again in community of property one Van Eeden, cannot sue as executrix of her first husband, A. J. Gronum, without the assistance of her said second husband, Van Eeden." The defendant then pleaded: 1st, That he had only collected £299 12s. 6d., and not £563 12s. 3d., as alleged in the summons; 2nd, That a settlement had been affected as to the ammount of £223. And he also made claim, in reconvention, for the sum of £732 8s., as being due to him out of the said estate of A. J. Gronum.

The plaintiff answered that the exception was bad in law, and joined issue generally on the special pleas and the claim in reconvention.

The case was tried in the High Court, sitting at Zeerust, on the 14th May, 1880, when, for the convenience of the parties and the witnesses, the Court, after counsel had argued the exception, upon which judgment was reserved, proceeded to take the evidence of the different witnesses.

Preller, in support of the exception: The plaintiff, having entered into a second marriage in community of property, cannot now sue without the assistance of her husband. A married woman is a minor in law, *Van der Linden*, Henry's edn., p. 94; *Cunningham and Mattinson on Pleading*, p. 345. If the defendant gain the case, against whom can he proceed for his costs? He cannot execute against the joint estate of the plaintiff and the second husband, for the latter is not a party to the suit. *(Broom's Commentaries*, p. 123, 5th edn.)

Cooper, contra: The exception is bad. The plaintiff sues as executrix, and in that capacity alone. The case is precisely the same as if she were still a widow. The mere fact of the existence of the second marriage does not take away the personal trust of the plaintiff as executrix of her first husband's estate. The second husband is a stranger to the estate. (See § 43 of the *Orphan Law.*)

Cur. adv. vult.

Postea.

1860.
May 14.
Sept. 9.

Van Eeden vs. Kirstein.

KOTZÉ, J.; The action in this case is brought by Mrs. Van Eeden, in her capacity as executrix testamentary of the estate of her first husband, A. J. Gronum, for moneys due to the estate by defendant, who was employed by her as auctioneer to sell the assets of the estate, and also to collect debts due to the same. An exception was raised by the defendant that Mrs. Van Eeden, as executrix of the estate of her first husband, could not come into Court and sue the defendant unassisted by her second husband. The case came before me at Zeerust in May last, when I reserved judgment on this exception, and directed the trial to proceed, as the parties were ready with their witnesses, and time and expense would thereby be saved. No direct authority was cited by counsel in support of this exception, but, on reference to *Voet* 5-1-15, it is clear the exception must be upheld. The general rule of our law is that a married woman, being a minor, has no *persona standi in judicio*, and must in law proceed by, or with the assistance of, her husband. To this rule only three exceptions are admitted, viz., 1st, in the case of married women carrying on a public trade in regard to all transactions connected with such trade; 2nd, where a woman married by antenuptial contract has reserved to herself the free administration of her separate property; and 3rd, in a suit by the wife against the husband (*V. d. Linden, Judicieel Practyk*, 1, 8, § 3.) *Voet*, in the passage above cited, differs from the general opinion of our text writers, and holds that, even if a woman be a public trader, she cannot sue in her own name unassisted by her husband, for it does not follow from her power to administrate and contract, that she is also entitled to sue in her own name. I have been unable to find a single Roman-Dutch authority giving a married woman the right to appear in a civil suit unassisted by her husband, in any but the three exceptions above enumerated. I have no hesitation, therefore, in holding with *Voet*, who puts the very case, that Mrs. Van Eeden cannot, as executrix of her deceased first husband's estate, sue for any money due to the estate, except by, or through, her second husband. The exception must, therefore, be sustained with costs. I have accordingly directed the Registrar to amend the summons, and the summons having now been amended,

1880.
May 14.
Sept. 9.

Van Eeden vs. Kirstein.

I will proceed to deal with the merits of the case. The plaintiff sues for recovery of three several sums from the defendant, viz., £153 15s. 11d., being balance due on sale; £563 12s. 3d., being moneys collected by defendant on behalf of the estate, and £223, being moneys due by the defendant on certain three promissory notes. The defendant in reconvention claims £732 8s. After considering the evidence, I find the following amounts in favour of the plaintiff, viz., the sum of £717 8s. 6d., as shewn in the account A annexed to the summons, and further £163 on the three promissory notes, for the defendant's oath that he paid off £60 stands uncontradicted. In favour of the defendant I find the following amounts: £107 10s., £114, £11 9s. 6d., £15 1s. 9d., £8 17s., £7 18., and £223 10s. 6d., being auctioneer's commission as per liquidation account approved by the Orphan Master. The defendant has not claimed or proved anything for collecting moneys due to the estate, and I am afraid that § 13 of the *Wees Wet*, now that the liquidation account has been confirmed by the Orphan Master, will prevent him from claiming anything on that account out of the estate. He has, however, his remedy, if any, against the executrix personally, who employed him. The result is, that deducting the items in favour of the defendant from the amount claimed in the summons, there must be judgment for the plaintiff for £391 1s. 9d., with costs.

POTCHEFSTROOM MUNICIPALITY *vs.* CAMERON AND SHEPSTONE.

Law No. 5, 1870, § 8.—*Secretary to Government.—Exception.*

The plaintiffs brought an action against C. for cancellation of a notice of publication of a diagram of a certain water-course, and for an order that the diagram should not be approved by the Government and issued to C. They joined the Secretary to Government as co-defendant in the action. Upon exception that the summons disclosed no right of action against the Secretary to Government; Held that the exception was well-founded.

1880. March 23.

Potchefstroom Municipality vs. Shepstone.

This was an argument on exceptions. The defendant, Cameron, had caused a diagram to be framed by a surveyor of a certain water-course, which diagram was published in the *Gazette*. The notice of publication was signed by the Colonial Secretary, the second defendant, and stated that the said diagram was lying for inspection in the office of the Surveyor-General, in terms of Law No. 5, 1870, § 8. The plaintiffs thereupon lodged a protest with the Colonial Secretary against the passing and issue of the said diagram, on the ground that the water-course in question was their property. The plaintiffs now sued the first defendant, Cameron, in an action for the setting aside of the said notice, and an order that the diagram shall not be approved and issued. They further joined the second-named defendant in the action, and prayed that, in his capacity of Colonial Secretary, he may be ordered to cancel the said notice, and not to issue the diagram under Law No. 5, 1170.

The second-named defendant *N.O.* took exception to the plaintiff's summons, "That the same is bad in law, on the ground that the acts, matters, and things alleged to have been done by the said second-named defendant do not disclose or give rise to any right of action on the part of the plaintiffs."

Morcom (Attorney-General), in support of the exception: The summons discloses no ground of action against the Colonial Secretary. This is the first attempt to make the Government a party to a suit where protest has been lodged against a published diagram. The action lies entirely between the plaintiffs and the defendant Cameron. The duties of the Colonial Secretary with reference to publication of notice of a diagram are merely ministerial. The proper course to be adopted is prescribed by § 8 of Law No. 5, 1870.

Hollard, contra: Where a wrong is done, there is a remedy. The Secretary to Government ought not to have published the notice. He should first have satisfied himself that the diagram contained an indorsement by the Surveyor-General that everything was in order. This is not the case.

Law No. 5, 1870, does not speak of water-courses. No publication of a diagram of a water-coure can take place under that law.

1880. March 23. — Potchefstroom Municipality vs. Shepstone.

The COURT upheld the exception with costs.

CURATOR OF MARAIS' ESTATE *vs.* WOODBINE CLOETE.

Commission de bene esse.

Commission de bene esse *granted, where the application was for the examination of two witnesses, who were named, and any other witnesses that may be produced by either party to the suit.*

Application for a commission *de bene esse* to examine Egbert J. Koch, Johan P. Koch, and any other witnesses that may be produced by either party in the above case at Durban, Natal.

1880. March 23. — Curators of Marais' Estate vs. Woodbine Cloete.

The COURT granted an order as prayed, and appointed the Resident Magistrate at Durban as Commissioner.

THE QUEEN *vs.* HERBST.

Theft.—Bringing Stolen Property into the Transvaal.

Where the prisoner had stolen cattle beyond the Transvaal boundary, and brought them into the Transvaal; Held that an indictment for theft lay against him.

The prisoner, Andries Herbst, was indicted for theft of cattle before the High Court sitting at M. W. Stroom. The indictment set forth that the theft was committed on the farm of Jan Dekker, in the district of Utrecht.

1880 April 7. " 8. — The Queen vs. Herbst.

Kent, before the prisoner was called on to plead, took the

1880.
April 7.
" 8.
The Queen vs Herbst.

exception that the Court had no jurisdiction to try the case, inasmuch as the crime, if any, was committed on the Zululand side of the boundary line, and not within the Territory of the Transvaal.

The COURT intimated that if it could be shewn that the cattle, which it is alleged the prisoner had stolen, were brought by him into the Transvaal, the Court would have jurisdiction.

Roth, for the Crown, was prepared to prove this.

The COURT then ruled that the prisoner must plead to the indictment, and if it were not proved that the cattle had been brought into the Transvaal, the prisoner's counsel could at a later stage urge the objection again.

Evidence was then led on behalf of the Crown to shew the crime was committed in the Transvaal; whereas the evidence for the prisoner was to the effect that the cattle were taken on the Zululand side of the boundary line. It was, however, proved that the cattle had been brought by the prisoner into the district of Utrecht within the Transvaal.

The COURT held that the objection to the jurisdiction could not be sustained, for even assuming that the cattle alleged to have been stolen were obtained by the prisoner beyond the Transvaal border, he, being a Transvaal subject, brought the cattle into the district of Utrecht, within the Territory of the Transvaal. Accordingly, as theft is a continuous crime under the Roman-Dutch Law, an indictment for theft will lie against the prisoner. (*Vide The Queen* vs. *Philander Jacobs, Buch. Rep.*, 1876, p. 171).

The JURY then upon the evidence convicted the prisoner.

THE QUEEN *vs.* BOTHA.

Postponement of Criminal Trial.—Non-appearance of Witnesses.

Where a criminal trial for robbery was postponed, on the ground of absence of material witnesses, to the following session of the Court, and the Crown did not proceed with the case at such following session, the Court ordered the accused to be discharged from further prosecution, and the bail bond executed by them to be cancelled.

1880.
May 25.
The Queen vs. Botha.

Kleyn, for the accused, father and son, who had been indicted for robbery at the last sitting of the High Court at Potchefstroom (see *ante* p. 145), moved upon petition for their release. The Crown had not taken any further steps in the matter, and the native witnesses, on account of whose absence the trial had been postponed, were still absent, and could not be found.

The COURT, regard being had to §§ 70 and 59 of the *Crim. Procedure*, ordered the accused to be discharged, and the bond executed by them to be cancelled.

Ex-parte RUSSELL.

Venia Ætatis.

An application for an order of venia ætatis *must be supported by a certificate from the magistrate of the applicant's domicile.*

1880.
May 24
Ex Parte Russell.

Application for an order of *venia ætatis*. The applicant set forth in her petition that she had been appointed executrix under the will of her father, and is twenty years old.

Preller, in support of the application.

The COURT ruled that in support of the application there must be a proper certificate from the magistrate of the

1880. May 24. — Ex parte Russ II.

place of applicant's domicile, as prescribed by Van der Linden, and gave leave to mention the matter again on a future day.

Ex parte DE HART.

Curator ad litem *appointed to an alleged lunatic.*

1880. June 22 — Ex parte DeHart.

Application for the appointment of a *curator ad litem* to one H. C. De Hart, the husband of the petitioner, and the granting of a summons directed against the said H. C. De Hart, assisted by his curator, calling upon him to show cause why he shall not by judgment of the Court be declared lunatic.

Meintjes, in support of the application.

The COURT appointed Advocate Cloete *curator ad litem,* and directed that the summons be served upon him as curator for the alleged lunatic.

MCHATTY *vs.* TWYCROSS.

Inspection of Bank Books.

An order for inspection of books in the possession of the opposite party to a suit will not be granted, where there is no allegation that leave for inspection had been asked and refused.

1880. June 22. — McHattie vs. Twycross.

Application to have access to the books of the Pretoria Branch of the Cape Commercial Bank. The applicant in his petition set forth that he is the defendant in an action instituted against him by the Bank, and that it is essential he should have access to the books of the Bank "containing the accounts of the firms James, Fox, & Jones; McHattie, Fox, & Co.; McHattie & Fox; S. Fox; and James & Fox,

1880. June 22. McHattie vs. Twycross.

with the said Bank, as the said books contain records of certain transactions, a correct statement of which it is necessary for your petitioner to have, in order to make good his defence.

Keet, for the applicant. The action by the Bank is to have McHattie declared a partner of the firms named in his petition, and as such, liable to the Bank in large sums of money. To disprove the case of the Bank, inspection of the Bank books is absolutely necessary.

Ford, with him *Innes*, for the respondent. The application is ill-advised. The Bank has not been asked to allow inspection of the books.

DE WET, C. J.: There is no allegation that application was made to the Bank to inspect the books, and that such request was refused. The application must be dismissed with costs.

Ex parte DE PASS AND HAMILTON.

Where, in a provisional case, a Deputy Sheriff has not made his return in time, the proper course is for the Sheriff to inform the Court thereof.

1880. June 22. Ex parte De Pass and Hamilton.

Summons for provisional sentence had been issued by applicants against the defendant, Schnell, returnable this day (24th June). The defendant resided in the district of Zoutpansberg, and the Sheriff had not yet received any return from his deputy.

Cooper moved that the return day of the summons may, under the circumstances, be extended.

The COURT granted the application, and intimated that the better course would be, where the Deputy Sheriff had not made his return in time, for the Sheriff to inform the Court thereof, and that no application by counsel was necessary.

WELSH *vs.* BERNHARD, COHEN, & Co.

Carrier.—Damage to Goods in transitu.

In the absence of anything manifesting a contrary intention on the part of the vendor, delivery to the carrier is delivery to the vendee.

Where goods are loaded on his wagon in good order and condition, a carrier is only liable for the actual damage done to such goods in transitu, *and cannot be compelled by the consignees to take over the damaged goods at cost price.*

1880. June 29.

Welsh vs. Bernhard, Cohen, and Co.

On the 7th April, 1880, the plaintiff, a carrier, loaded up certain goods and merchandise at the stores of Randles Brothers & Hudson, Durban, Natal, and signed the usual way-bill, by which he acknowledged to have received the goods and merchandise in good order and condition, and undertook to deliver them in the like good order and condition, at the stores of Bernhard, Cohen, & Co., of Pretoria. Among the goods loaded up on the plaintiff's wagons were certain five bales of cotton blankets, four of which bales were damaged *in transitu*. On the 14th May the goods were delivered at the stores of Bernhard, Cohen, & Co., the defendants, who, on discovering that the four bales of blankets had been damaged, refused to receive the same, and required the plaintiff to take over the damaged bales at cost price. This the plaintiff declined to do, but intimated his willingness to pay for the actual damage done to the bales. The plaintiff had the damage done to the bales surveyed by two competent persons, who assessed the damage at £1 10s., and he then instituted an action for the full amount of carriage, £172 19s., less the sum of £1 10s., being the amount of damage done to the four bales. The defendants pleaded a tender, being the amount of carriage, less the sum of £63 2s. 6d, the cost price of the four damaged bales of blankets.

Ford, for the plaintiff, contended that the property in the

1880.
June 29.

Welsh vs. Bernhard, Cohen, and Co.

bales being in defendants, they were merely entitled to the actual damage caused to their property *in transitu*. *Mayne on Damages*, p. 8, p. 25 (3rd edn.)

Keet, with him *Cloete*, for the defendants, argued that as they were wholesale dealers, damaged bales of blankets were useless to them. The sale of the bales, as such, had been spoilt by the damage done. There was, therefore, nothing unreasonable on the part of defendants, who claimed the right of forcing the carrier to take over the damaged bales at invoice price.

THE COURT (De Wet, C. J., and Kotzé, J.,) held that, in the absence of a contrary intention on the part of the vendors, delivery to the carrier is delivery to the vendees. The defendants cannot compel the plaintiff, as carrier, if he be unwilling, to take over the damaged goods, but are only entitled to charge him with the actual damage done to the goods *in transitu*.

Judgment was accordingly given in favour of the plaintiff for the amount of carriage claimed, less £1 10s., the amount of damage sustained.

VAN BREDA *vs.* JOHNSTONE.
COLQUHOUN *vs.* BRITS.
GREEN *vs.* GIBAUD.

Attorney's Fees.—Law No. 2, 1871, § 13.

Notwithstanding the High Court Proclamation of 18*th May*, 1877, *an attorney practising in the Landdrost Court is entitled to his fees as fixed by Law No.* 2, 1871, § 13.

1880.
July 1.
" 8.

Van Breda vs. Johnstone.
Colquhoun vs. Brits.
Green vs. Gibaud.

The above cases were appeals from the decision of the Landdrost of Pretoria. The point for decision was, whether an attorney in the High Court, practising in the Landdrost Court, is entitled to fees as fixed by Law No. 2, of 1871, § 13, or can only charge agent's fees for work done in the Landdrost Court?

1880.
July 1.
„ 8.

Van Breda vs. Johnstone.
Colquhoun vs Brits.
Green vs. Gibaud.

Keet, with him *Preller*, for the appellants.

Morcom (Attorney-General), for the respondents.

Postea (July 8th).

De Wet, C. J.: These are appeals from the decision of the Landdrost in the matter of attorneys of the High Court practising as agents in the Landdrost Court. Before the establishment of the present High Court of the Transvaal, on the 18th of May, 1877, there existed in the Province three courts, viz., the Hooge Geregtshof, or High Court, the Court of Landdrost and Heemraden, and the Court of Landdrost. By the Law No. 2 of 1871, the then Volksraad legislated and declared that there should be a separate scale of fees for attorneys practising before the Hooge Geregtshof and for agents practising in the Lower Courts. Schedule 13 of that Law is headed "Toelage aan Procureurs voor het Hooge Geregtshof practiseerende." Schedule 14 is headed "Toelage aan Agenten voor de Laagere Geregtshoven." By resolution of the Volksraad, Art. 151, dated the 11th June, 1873, the words "voor het Hooge Geregtshof practiseerende" were expunged, and the scale of fees for attorneys was made to apply to all Courts, viz., the Hooge Geregtshof, the Court of Landdrost and Heemraden, and the Court of Landdrost. Thus, before the establishment of the present High Court, an attorney could claim fees for work performed in the Landdrost Court under schedule 13. On the 18th May, 1877, the present High Court was established by proclamation, confirmed by order in Council. The High Court thus created was to have jurisdiction in all cases above the jurisdiction of the Landdrost Court. It has the same jurisdiction which was enjoyed by the old Hooge Geregtshof and Court of Landdrost and Heemraden prior to the 18th May, 1877. Under the provision of the Proclamation already alluded to, the present High Court has approved, enrolled, and admitted as advocates and attorneys of the Court, those advocates and attorneys who had practised in the Courts which were in existence prior to the date of such Proclamation, and also those persons who have been found qualified to act as advocates and

1880.
July 1
"
Van Breda vs. Johnstone.
Colquhoun vs. Brits.
Green vs. Gibaud.

attorneys since the Proclamation. Upon carefully perusing the Proclamation I cannot discover anything which takes away from the attorneys who formerly practised, and who now practise in the Landdrost Court, the right to charge their fees as provided for under the 13th schedule. Neither the Proclamation establishing the High Court, nor the High Court Rules, as at present framed, say anything respecting the fees chargeable in the Landdrost Court. To hold, therefore, that the right existing at the time the Landdrost Court was in existence, of charging fees in that Court, under Schedule 13, is taken away by the Proclamation, is to import into that Proclamation and our Rules of Court that which is not to be found in them. It has been argued by the Attorney-General that in the Colony of the Cape of Good Hope, an attorney, when he appears in the Magistrate's Court, is not entitled to claim more than an agent for work performed and services rendered in such Court; but it must be remembered that it was by no rule of the Supreme Court this was brought about. An attorney of the Supreme Court, when he appears in the Magistrate's Court, appears as agent, and is only entitled to an agent's fees, by virtue of section 41, Act 20, 1856. If, as I think, and I hold it to be a sound principle, that an attorney of the High Court practising in the Landdrost Court, ought not to be on a different footing from an agent practising in such Court, it will be for the Legislature to pass a measure similar to that passed by the Legislature of the Cape Colony; but until the repeal of Schedule 13, I am of opinion that for the purposes of this case all attorneys admitted to practice in this Court, and as such practising in the Landdrost Courts—no matter whether such attorneys have practised as attorneys in the old Law Courts or have only commenced their practise as attorneys in the present High Court—are entitled to charge fees in accordance with what is laid down in Schedule 13. The taxation in this case must, therefore, be amended. As this, to all intents and purposes, is merely a test case, no order will be made as to costs.

KOTZÉ, J.: The main question we are called upon to decide in these appeals is, whether an attorney is entitled

1880.
July 1.
" 8.

Van Breda vs. Johnstone.
Colquhoun vs. Brits.
Gr en vs. Gibaud.

of right to have his Bill of Costs, for work done in the Landdrost Court, taxed by the officer of that Court according to the scale of fees provided by § 13 of Law No. 5 of 1871? It has been argued that an attorney, when he appears in the Landdrost Court, cannot charge more than an agent practising in that Court. I admit this would be a just and sound principle, but we have to deal with the local law on the subject, and must interpret and enforce the law as we find it. By the Law No. 5, of 1871, § 13, a particular scale of fees was allowed to attorneys practising in the old High Court of justice, and a separate scale of fees is, by § 14, allowed to agents practising in the Lower Courts. The law, therefore, not only draws a distinction between the two classes of practitioners, but it also follows that an attorney could not claim the right of having his bill taxed for work in the Landdrost Court according to the scale allowed by § 13, which, at that time, only applied to attorneys practising in the old High Court. In 1873, however, the Legislature provided that the scale of fees prescribed by § 13 of the Act of 1871 should be the tariff for attorneys practising in *any* Court, including, therefore, the Court of Landdrost. It was accordingly the undoubted right of an attorney before the present High Court was established by Proclamation of 18th May, 1877, to have his bill taxed for work done in the Landdoost Court according to the tariff under section 13, and not according to the scale allowed to agents under § 14. Now, it is contended that the High Court Proclamation and the Rules of Court, framed by myself as sole judge, and approved by the Administrator under the Proclamation, have deprived an attorney of the right which he formerly possessed. It is said that the attorneys of the Republic, having been admitted by this Court, have now a much higer status, and as Rule 86 provides that no attorney of the High Court can receive payment either in whole or in part of his bill of costs, unless it has first been taxed by the Master, on pain of suspension or striking off the Roll, it follows that the Proclamation establishing the Court, and the subsequent Rule framed under it, have worked a repeal of the local law, consequently an attorney cannot claim fees for work done in the Landdrost Court under § 13 of the Act of 1871, as

1880.
July 1.
" 8.

Van Breda vs. Johnstone.
Colquhoun vs. Brits.
Green vs. Gibaud.

amended by the Legislature in 1873. It is not now necessary to decide whether, regard being had to the Annexation Proclamation, which has a binding legal effect *(Campbell* vs. *Hall, Cowp. Rep.)*, the local law can be altered by a subsequent proclamation and Rule of Court framed under it. This point does not arise in this case. The simple question is, what is the proper scale of fees according to which an attorney's bill of costs is to be taxed for work done in the Landdrost Court? The present High Court was established to try cases above the jurisdiction of the Court of Landdrost, and it enjoys practically the same jurisdiction which was exercised by the old High Court of Justice, and the Court of Landdrost and Heemraden, before annexation. Now, by what process of reasoning can it be maintained that the High Court Proclamation and 86th Rule of Court have deprived an attorney of the right which he possessed under the local law when conducting a case in the Court of Landdrost? To hold that the Proclamation and Rules of Court, which professedly regulate the position of attorneys only in so far as the High Court is concerned, have taken away this right, is to import into those instruments what they do not contain, for the Proclamation and rules do not in any way bear on the rights and duties of attorneys when practising in the Court of Landdrost. The right of an attorney to have his bill taxed by the Registrar of the Landdrost Court, in accordance with the scale fixed by the Statute Law of the country, is in no way affected by the High Court Proclamation and the Rules of Court. They are wholly beside the question. The argument against the attorney on this point amounts to a mere *petitio principii*. Much was said at the Bar about expediency, policy, and equity, in connection with the relative positions of attorney and agent practising in the Lower Court, and some sound principles were set forth with considerable ability. But these are matters which we cannot entertain in the present instance. *Judicis est jus dicere sed non dare*, and in my opinion the Bills of Costs in question must be taxed in accordance with the scale fixed by § 13 of the Act of 1871. A minor point was urged upon us, that the attorney in the present case was admitted after the establishment of the High Court, and that consequently he cannot claim the

1880.
July 1.
" 18.

Van Breda vs. Johnstone.
Colquhoun vs. Brits.
Green vs. Gibaud.

privilege allowed to attorneys of the Republic. But as admission by the High Court simply confers the status of attorney, but does not regulate the rights incident to the status so far as the Court of Landdrost is concerned, it is clear that, in respect to the question of taxation in the Lower Court, no distinction can be drawn between attorneys admitted before and after the annexation. The Act No. 1, of 1874, § 1, as amended by the Volksraad in June, 1876, has no application in the present cases.

Appeals allowed accordingly. The taxation to be made under § 13 of the Act of 1871. No order as to costs.

TWYCROSS *vs.* MCHATTIE.

Rule VII.—Arrest.—Peregrinus.

Where an alleged debtor, a pregrinus, *was about to depart from Pretoria to another place within the jurisdiction of the Court, and had been arrested under Rule VII.; Held that he was in the same position as an* incola, *and not having any present intention of leaving the jurisdiction, the Court set aside his arrest with costs.*

1880.
July 8.
" 10.

Twycross vs. McHattie.

The applicant had been arrested at the instance of respondent under a writ of arrest issued by the Registrar in terms of Rule VII. The affidavit of McHattie, upon which the arrest was granted, set forth that Twycross was inspector and auditor of the Cape Commercial Bank, and as such domiciled in Capetown; that Twycross had packed up and removed all his luggage, given up his room at the European Hotel, and taken his passage by coach to Potchefstroom, with the intention, as defendant verily believed, of proceeding to Capetown and removing himself beyond the jurisdiction of the Court, thus defeating defendant in an action for damages, which had accrued to him against the said Twycross. On the 3rd July, an hour before the coach started for Potchefstroom, the applicant was arrested by the Sheriff and held to bail in the sum of £10,000. A day

1880
July 8.
" 10.
Twycross vs. McHattie.

or two before the arrest, the applicant had stated his intention of proceeding to Lydenburg with the view of inspecting the branch of the Commercial Bank at that place. The affidavit of Twycross set forth that he was one of the curators of the sequestrated estate of James & Fox, of Pretoria, and that he was proceeding to Potchefstroom for the purpose of inspecting the branch of the Bank in that town, and for no other reason, with the intention of returning to Pretoria after the lapse of about three weeks.

Cooper, with him *Ford*, for the applicant. There was no intention on the part of Twycross to leave the country. He was merely proceeding to Potchefstroom, within the jurisdiction of the Court, for a short time, intending to return to Pretoria. *Norden* vs. *Sutherland*, 3 *Menz.*, 133.

Keet, with him *Preller* and *Cloete*, for the respondent. The preparations for applicant's departure for Potchefstroom were sufficient to justify the belief that he intended to return to Capetown, beyond the jurisdiction of the Court. The applicant is a *peregrinus* having no property in the Transvaal, and could at any moment have proceeded from Potchefstroom to the Cape Colony. The statement of Twycross that he was about to proceed to Lydenburg, when in reality it was his intention to go to Potchefstroom, is a suspicious circumstance, and shews that he contemplated leaving the jurisdiction. *Van der Linden* (Henry's edn), p. 430; *Van Leeuwen* (Roman Dutch Law), V., 7, 2.

Cooper, in reply: The Rule of Court draws no distinction between an *incola* and a *peregrinus*.

Postea.

De Wet, C. J.: Under Rule VII., a *peregrinus* is in the same position as an *incola*, and in order to arrest him, it must be shewn that he intends immediately leaving the Territory. The affidavits fail to establish this; on the contrary, the alleged debtor was merely about to depart from Pretoria to another place within our jurisdiction. (The Chief Justice referred to *Van der Linden*, p. 430; *the 7th Rule of Court; Peckius de Jure Sistendi*, cap. 4, §

1880. July 8. " 10. — Twyeross vs. McHattie.

4; *Erskine's Institutes*, bk. 1, tit. 2; 22 *et in notis*; *Norden* vs. *Sutherland*, 3 *Menz. Rep.)*.

Arrest set aside with costs.

CELLIERS *vs.* BOSHOFF.

Judgment against defendants in default.

1880. July 22. — Celliers vs. Boshoff.

Action by the curator in the estate of the late W. H. Boshoff for repayment of money and commission by the defendants. The defendants were in default. The summons and notice of bar had been served on them personally.

After evidence had been led for the plaintiff,

The COURT gave judgment against the defendants, with costs.

POULTNEY *vs.* THE MASTER.

Fees for consultation between counsel on the same side in an appeal case will not be allowed as between party and party.

1880. July 29. — Poultney vs. The Master.

Review of taxation in the appeal case of *Poultney* vs. *Harding*. Upon the bill of costs as between party and party being presented for taxation, the Master refused to allow the fees charged by appellant's counsel for a consultation which they had together in the interests of their client.

The COURT ruled that no fee for consultation on brief in appeal cases can be allowed as between party and party.

Cooper *vs.* Jocks.

Adiation of Inheritance.—Liability of Heir for debts due by the Estate.

Where the defendant was heir in right of his wife in the estate of the testator, and gave instructions to sue for recovery of a debt due by the estate, receiving at the same time an advance of £35 on such debt; Held, that he had adiated the inheritance, and was liable for the debts of the estate.

1860. July 16. Aug. 5.

Cooper vs. Jocks.

Action for the recovery of £50 2s. 2d., being the amount of a taxed bill of costs, under the following circumstances: Gutgahr, by his last will, appointed his two children his heirs, and left the administration of his estate to the Orphan Master. On the 26th September, 1875, Gutgahr died, leaving certain moveables, which realised £23 8s. 6., and an acknowledgement of debt for £345, signed by Hershensohnn, in favour of the testator, as assets in his estate. The defendant, Jocks, was the husband of one of the two daughters of th testator. He called at different times on the Orphan Master, and in March, 1876, asked for his inheritance under the will, and was annoyed that the money due on the acknowledgement of debt had not yet been obtained from Hershensohnn. He further desired the Orphan Master to sue for the recovery of the same, and obtained £35 from the Orphan Master on account of his share in the amount of the acknowledgment of debt. The Orphan Master then, on behalf of Gutgahr's estate, sued Hershensohnn, and obtained judgment against him for the £345. On appeal this judgment was, however, reversed by the High Court, with costs against the estate. The plaintiff acted as attorney and advocate for Hershensohnn, both in the first instance and on appeal. His bill of costs was taxed by the Master at £50 2s. 2d. The Orphan Master stated at the trial that had he not been instructed by defendant to take legal proceedings, he would, nevertheless, have sued Hershensohnn for recovery of the £345. It also appeared that, out of the

1880.
July 16.
Aug. 5.

Cooper vs. Jocks.

£23 8s. 6d., being the proceeds of the moveables found in the estate, there was, after payment of necessary expenses, a small balance of £6 1s. 6d. left. To this, however, the defendant had laid no claim, nor had he received any part thereof.

Ford, with him *Cloete,* for the plaintiff. The defendant, as husband of one of the testator's daughters, meddled with the estate as one of the heirs, and gave instructions to the Orphan Master to sue Hershensohnn for the recovery of the £345. In the recovery of this amount the defendant had a direct interest, and he also accepted £35 on account of his share in that amount. The defendant had adiated his inheritance, and is liable for the debts of the estate. The bill of costs sued on is a debt for which, therefore, the defendant is responsible. *Van der Linden* (Henrys edn.), p. 149; *Grotius* (Maasdorp's edn.), p. 156; *Tennant's Notary's Manual* (4th edn), pp. 71-2.

Keet, with him *Preller,* for the defendant, contended that there was no adiation on the part of Jocks. The £35 was advanced to him out of the funds of the Orphan Chamber, and not out of the testator's estate. The defendant, if liable at all, can only be such to the extent of his share, or of the assets in the estate, and not also for the costs which may be due to the plaintiff.

Ford, in reply, referred to *Lybrecht,* vol. 2. ch. 5, § 2, pp. 30-31, § 7, and *seq.; Van Leeuwen* (Roman Dutch Law), bk. 3. ch. 10, § 3. The defendant having adiated his share, is liable for all the debts and charges due by the estate. *Lybrecht, R. Practijcq,* vol. 1, p. 39.

Cur. adv. vult.

Postea.

De Wet, C. J.: The evidence shows there was adiation of his inheritance by the defendant in right of his wife. There is, however, nothing to prove that the other daughter of the testator has repudiated her share in the estate, and consequently the defendant ought not to be held responsible

for more than his share of the debt, that is, £25 1s. 1d., of the amount sued for, together with costs of suit.

1880.
July 16.
Aug. 9.

Cooper vs. Jocks.

COVENTRY BROTHERS *vs.* KINGSMILL.

Carrier.—Through Rate.—Transhipment.—Delay in Delivery.—Damage.

A carrier, who undertakes to convey goods from Durban to Pretoria, at a through rate, is not, in the absence of any stipulation to the contrary, prevented from transferring the goods to other wagons in transitu, *provided no unreasonable delay is thereby caused in the delivery.*

A carrier is liable for damage caused by unreasonable delay in the delivery of goods.

1880.
July 19.
" 20.
Aug. 5.

Coventry Brothers vs. Kingsmill.

Action for the recovery of £573 14s. 5d., being carriage at 55s. per cwt. due on four loads of goods and merchandise, conveyed by plaintiffs from Durban, Natal, and delivered at the stores of defendant in Pretoria. The defendant pleaded that the plaintiffs agreed to carry the goods at 55s. per cwt., being the through rate to Pretoria; instead of which they transferred the loads at Harrismith to other wagons, thereby causing delay in the transit and loss to the defendant exceeding the sum of £100. That the rate of carriage from Durban to Harrismith was 36s. per cwt. and from Harrismith to Pretoria 9s.; the defendant therefore tendered the sum of £456 17s. 5d., being carriage at the rate of 27s. and 9s., as aforesaid, to which alone the plaintiffs are entitled.

Issue thereon.

On the 18th November, 1878, the plaintiffs received four loads of goods and merchandise, from Randles Brothers & Hudson, Durban, Natal, to be delivered at the stores of the defendant, in Pretoria. The way-bills signed by the

1880.
July 19.
" 20.
Aug. 5.

Coventry Brothers vs. Kingsmill.

plaintiffs were in the usual form, and by which the plaintiffs, as carriers, undertook to deliver the goods, in good order and condition, at the stores of the defendant at Pretoria, at 55s. per cwt. The way-bills contained no stipulation as to the time within which the goods were to be delivered, nor that the goods were to be carried through to Pretoria without transhipment. Owing to rainy weather, and the bad state of the road, as well as the poor condition of the plaintiff's oxen, the four loads did not reach Harrismith until the end of December. The usual time for a wagon to travel from Durban to Harrismith is from 25 to 26 days. After remaining at Harrismirh eight days, the four loads were transferred to other wagons, which left Harrismith on the 7th January, 1879, for Pretoria. Three of the loads were delivered at the stores of the defendant on the 15th January, but the remaining load, owing to a breakdown of the wagon on the road, did not arrive until the 25th January, 1879. It was also proved that, in November, 1878, the through rate of carriage from Durban to Pretoria was 55s. per cwt.; whereas the rate of carriage from Durban to Harrismith was 36s., and from Harrismith to Pretoria was 9s. per cwt. It further appeared to be a custom with many carriers, who conveyed goods from Durban to Pretoria, to tranship at Harrismith, unless there was a stipulation in the way-bill to the contrary. The defendant proved that the average time of transit for through wagons from Durban to Pretoria was from 34 to 35 days, and that, owing to late delivery, he had sustained damage in the sale of the goods to the amount of £100.

Cooper, with him *Ford*, for the plaintiffs: The defence set up has failed. There is no proof that the plaintiffs undertook to carry the goods through to Pretoria without any transhipment at Harrismith. The custom is to tranship, and thereby the consignee is directly benefitted; for, by sending the goods on in other wagons with fresh oxen, the delivery is expedited. The through rate obtained by the carrier renders him responsible all through, whereas the half-way rate would terminate his liability on delivery at Harrismith. There has been no unreasonable delay by

the plaintiffs in the delivery of the goods. The season and state of the road must be considered.

Preller, with him *Cloete*, for the defendant. The consignors, as agent for the defendant, contracted with the plaintiffs to convey the goods through from Durban to Pretoria. To secure regular transit all through, without the necessary delay caused by transhipment at Harrismith, a higher or through rate of carriage was agreed upon. By accepting the through rate, therefore, the plaintiffs bound themselves not to tranship the goods, although the way-bill contains no condition to that effect. (*Chitty and Temple on Carrying*, p. 159; *Addison on Contracts*, p. 164, 7th edn.; *Roscoe's Nisi Prius*, p. 569, 14th edn.) There is also unreasonable delay. The plaintiffs, knowing their oxen to be in poor condition, nevertheless undertook to carry the goods, which were 57 days on the road. For this delay in delivery they are clearly responsible to the consignee.

Cooper, in reply: The way-bills constitute the contract between the parties, and nothing is said in them about through carriage, or the time within which delivery at Pretoria must be made. The goods were delivered within two months, the distance from Durban to Pretoria being about 450 miles.

Cur. adv. vult.

Postea (Aug. 5th).

De Wet, C. J.: We think that, in the absence of proof to the contrary, a carrier undertaking to deliver goods in Pretoria from Durban, Natal, has the right to transfer the goods to other wagons *in transitu;* provided the consignee is not inconvenienced by unreasonable delay. In the present instance, as no time was stipulated within which the goods were to be delivered, the carriers were bound to deliver within a reasonable time. The plaintiffs have, however, been guilty of unreasonable delay, to the loss of the defendant. There will, therefore, be judgment for the plaintiffs for the carriage they have earned, at 55s. per cwt.

1880.
July 19.
" 20.
Aug. 5.

Coventry Brothers vs. Kingsmill.

less £100, the loss sustained by the defendant; but no order as to costs.

MUNICIPALITY OF POTCHEFSTROOM *vs.* CAMERON.

Law No. 5, 1870, § 8—*Publication of a Diagram of a Water-course —Servitude.*

The provisions of Law No. 5, 1870, § 8, *must be strictly observed. Where, therefore, a diagram had been published by Government Notice in the* Gazette, *without any endorsement by the Surveyor-General on such diagram; Held that the notice of publication must be set aside.*

Law No. 8, 1870, § 8, *merely refers to diagrams of corporeal things, which can be surveyed, and not also to incorporeal things,* quæ tangi non possint. *Where, therefore, a diagram had been framed by defendant of a water-course, running through the land of the plaintiff; Held that such diagram could not be published for issue and signature by the Administrator, and must be set aside.*

No deviation or extension can be made in a water-course or aqueduct within the limits of the servient tenement, but the course originally selected and fixed upon must be adhered to; unless the owner of the servient tenement consents to the deviation or extension.

1880.
May 28.
" 29.
June 1.
Sept. 9.

Municipality of Potchefstroom vs. Cameron.

(This case was heard on Circuit at Potchefstroom before Kotzé J.)

The defendant Cameron had caused a diagram of a certain furrow, or water-course, which he claimed as his *jure servitutis*, to be framed by Surveyor H. M. Anderson. This diagram was published by Government Notice in the *Gazette* of 30th September, 1879, under the provisions of Law No. 5, 1870, § 8. The plaintiffs, thereupon, lodged a protest against the approval and issue by the Government of the said diagram, on the ground that the said furrow was the pro-

perty of the Municipality of Potchefstroom. In terms of Law No. 5, 1870, the plaintiffs were obliged to make good their protest by action in a competent Court.

At the trial, it was proved that the furrow, or water-course, in question was on land vested in the Municipal Commissioners, the plaintiffs. Evidence was also led on behalf of the defendant that in 1844 the land through which the furrow runs belonged to the Government, which had granted a neighbouring *praedium* to one Grobbelaar. This *praedium* received its water from the Mooi River by means of the furrow in question. Grobbelaar subsequently sold the *praedium* to Grimbeek, who, in 1878, disposed of a portion thereof to Cameron, the defendant. It also appeared that the diagram, which Cameron had caused to be made of the furrow and published in the *Gazette*, contained no endorsement of approval by the Surveyor-General, in terms of Law No. 5, 1870.

Keet, with him *Cloete*, for the plaintiffs. Cameron has caused a water-course on plaintiff's land to be surveyed, and a diagram thereof framed and published, as if the water-course were his property. This he had no right to do. The diagram has no endorsement of approval by the Surveyor-General, as required by the Act of 1870. No area is given of the extent of the water-course. *Volksraad Besluit*, 18th May, 1870; *Surveyors' Instructions*, § 11. The dam and head of the furrow were moved higher up the Mooi River in 1850. Hence, there can be no servitude by prescription in the furrow, for a material alteration was made within the third of a century. Grobbelaar only obtained transfer in 1864 of the land granted to him in 1844. Consequently, there can be no question of a servitude acquired by prescription, for previous to 1864 Grobbelaar was merely in occupation of land still vested in the Government. As two separate *praedia* did not exist before 1864, there can be no prescription of 33 years. Even assuming that Grobbelaar obtained a grant of this furrow in 1844 from the Government, there has been no registration of the servitude, which can not be recognised as against the plaintiffs, who are third parties. *Van Leeuwen* (Roman Dutch Law), bk. 2, ch. 19,

1860.
May 28.
" 29.
June 1.
Sept. 9.

Municipality of Potchefstroom vs. Cameron.

§ 2; *Steele* vs. *Thompson*, 13 *Moo. P. C. Ca.*; *Parkin vs. Titterton*, 2 *Menz.*, 296. Grobbelaar and Cameron are both using furrows on land vested in the plaintiffs. The main furrow has been cut into three, and this is contrary to law, for a servitude is indivisible, *Voet* 8, 6, 6. But there is no satisfactory evidence that a servitude was really constituted. A servitude can not be presumed. A praedial servitude, moreover, may be granted to an individual for life merely, and this may be all that was intended to be conveyed by the Government to Grobbelaar in 1844. *Hunter's Roman Law*, p. 245.

Preller, with him *Ford*, for the defendant. The fact that the diagram was published before it was approved of by the Surveyor-General, does not entitle the plaintiffs to bring this action. What ground had they for assuming the Administrator would finally sign and issue the diagram before its approval by the Surveyor-General? The grant to Grobbelaar in 1844 gave him a title to the Land. No Registry-office existed in those early days of the country's history. The furrow was granted with the land, and Grobbelaar always enjoyed the uninterrupted use of it. The Municipality never objected to this furrow, until Cameron had it surveyed and the diagram published. It is clear that so far back as 1844 two separate *praedia* had existed, viz., the land granted to Grobbelaar, and the land remaining in the Government—the former enjoying the benefit of a water-course through the latter. A servitude by prescription has, therefore, been established. The head and dam of the furrow were shifted in 1850, with the consent of the Landdrost, who represented the Government. The cutting from the furrow made by Cameron does not injure the plaintiffs. It is a mere slight variation. *Addison on Torts*, p. 298, 5th edn. The defendant can, if he is entitled to the use of the furrow at all, make a slight deviation on the servient tenement—the property of the plaintiffs, leading the water on to some other portion of his dominant tenement. *Addison on Torts*, pp. 327-9; *Voet* 8, 6, 12. The water-furrow is also used by persons other than the defendant. There is no evidence that they are not entitled so to use it. If the Court declares against the existence of

the servitude, these persons, who are not before the Court, may be prejudiced in their rights.

Keet in reply.

Postea (Sept. 9th).

KOTZÉ, J.: in this case the Commissioners of the Municipality of Potchefstroom pray that a Government Notice, No. 145, of 1879, publishing a certain diagram, made by Surveyor Anderson, for and on behalf of the defendant, of a water-course running through the town lands of Potchefstroom, may, together with the said diagram, be cancelled and set aside. It appears that, in 1878, one Johan Daniel Grimbeek sold a certain piece of ground, adjoining the land of the Municipality, to the defendant Cameron. The ground so sold is portion of the *prædium* originally granted in 1844, by vote of the adjunct Volksraad in Potchefstroom, to Johannes Hermanus Grobbelaar. The original resolution of the Raad containing this grant is proved to have been lost, and secondary evidence is admissible to show the nature and extent of the grant. The *prædium* was given to Mr. Grobbelaar for services rendered as Landdrost of Potchefstroom. There was at the time of the grant a furrow leading water from the Mooi River across Government ground (now vested in the Municipal Commissioners), on to the land granted to and occupied by Grobbelaar. This furrow is marked Cameron's furrow on the plan or diagram B, framed by Surveyor Loxton, and, according to one of the witnesses, is as old, if not older, than the town of Potchefstroom. Much was said during the argument on the point whether a servitude or *jus aquæductus* was ever constituted or acquired by prescription in favour of the land or *prædium* granted to Grobbelaar, but in the view I take of this case it will be unnecessary to enter into this question. My judgment will proceed on the assumption that such a servitude does exist. Assuming then that the land granted to Grobbelaar is entitled to the *jus aquæductus*, and that Cameron by purchase of a portion of this *prædium* is also entitled to the servitude (which is not altogether free from doubt, *vide Voet*, 8, 4, 13, *Gluck* 8, § 659, *et* § 664), there seem to me to be several reasons why the prayer of

1880.
May 28
" 29.
June 1.
Sept. 9.

Municipality of Potchefstroom vs. Cameron.

the plaintiffs should be granted. In the first place the provisions of § 8, of Law No. 5 of 1870, have not been complied with. The diagram of Surveyor Anderson of this water-furrow over Municipal land was not approved by the Surveyor-General, nor is there any endorsement of approval by him upon the diagram, as required by law, before publication of the diagram by Government notice in the *Gazette* can take place. The provisions of § 8 must be strictly observed, for a diagram once signed by the head of the Government becomes an unimpeachable document, although, no doubt, under certain circumstances, a diagram so signed may be set aside by a Court of Law. It was argued that the plaintiffs were premature with their action, inasmuch as they had no right to assume that the Administrator would sign the diagram; and, even if His Excellency did sign the same, the plaintiffs could then have brought an action to have the diagram set aside. But, by the law, the plaintiffs were bound to lodge their protest within three months after publication of the notice, and, having lodged their protest, they were bound to establish that protest by action in a competent Court. This is the proper course laid down in the statute, which the plaintiffs have followed, to enable them to object to the diagram. The non-endorsement of approval by the Surveyor-General may be no reason for setting aside the diagram, which has not been finally signed and approved by the Administrator, but it certainly is ground for setting aside the Government Notice No. 145, which can only be published after an endorsement of approval has been made on the diagram by the Surveyor-General. Again, the diagram which has been published is not the diagram of a farm, erf, or piece of land, the property of the defendant, but of a water-course through land vested in the plaintiffs. The defendant has, at the most, only a right of leading water from the Mooi River through this furrow, the furrow itself—the soil—being the property of the Municipality (*Voet* 8, 4, 14; *Dig.* 8, 5, 4), and, having but a real right, and not the land itself, how can a diagram of this real right—*a res incorporalis quæ tangi non possit*—be framed and published under § 8 of Law No 5, of 1870, which speaks only of diagrams of certain corporeal things? The right cannot possibly be surveyed, although the land

over which the right is to be exercised may be surveyed, but then the diagram represents not the right, but the soil subject to the right, which is the land of the plaintiffs, and not of the defendant. How can the Surveyor-General, by any possibility, satisfy himself and certify as to the accuracy of such a diagram? Section 8 does not contemplate the case of servitudes at all. Lastly, a portion of the furrow recently made by Cameron, and marked *New Cutting* 3-2, on plan B 1, is on land vested in the Municipality. This is not clearly shown on the diagram of Mr. Anderson, who merely surveyed and marked down the aqueduct; but, from actual inspection, I found such to be the case. No deviation or extension can be made in the furrow within the limits of the servient tenement, but the course originally selected and fixed upon must be adhered to *(Dig.* 8, 1, 9), unless, indeed, the owner of the servient tenement consents to the deviation or extension. Upon the above grounds, the Government Notice No. 145, so far as it relates to the diagram in question, and the diagram itself, must be cancelled and set aside. My decision will not prevent Mr. Cameron, if the portion of land he purchased is likewise entitled to the servitude, from making a new cutting on his own land, leading water from the old furrow below the point marked 2 on the plan B 1. The judgment of the Court is, therefore, for the plaintiffs with costs.

BAILLIE *vs.* HENDRIKS, HOFFMAN, & BROWNE.

Public Stream.—Riparian Proprietor.

The ordinary use of running water is that which is required for domestic purposes and the support of animal life. The extraordinary use consists in the application of the water for agricultural purposes, the driving of machinery, and the like.

If an upper riparian proprietor, in the exercise of the ordinary use, requires all the water in a public stream, the lower riparian proprietor will have no redress; but

the upper proprietor can only exercise his right to the extraordinary use of the water consistently with a similar right in the lower proprietor.

1880.
June 1.
" 2.
" 6.
Sept. 9.

Baillie vs. Hendriks, Hoffman, and Browne.

(This case was tried at Potchefstroom before Kotzé, J.)

The plaintiff, Captain Baillie, as owner of the farm Vijfhoek on the eastern bank of the Mooi River, a public stream, brought an action for a declaration of rights, damages, and a perpetual interdict against the defendants, who are mill-owners, having their mills on the western bank of the river. These mills are driven by water from the Mooi River, led in furrows through the land of the Municipality of Potchefstroom. The plaintiff complained that, as such mill-owners, the defendants had diverted nearly all the water in the river at various points above the plaintiff's dam, to his great loss and damage, amounting in all to £500. The plaintiff further prayed that the defendants may, by perpetual interdict, be restrained from making an unreasonable use of the water. The defendants pleaded a general denial. The further facts, so far as material, appear sufficiently from the judgment below.

Kleyn, with him *Cloete*, for the plaintiff: The plaintiff, being a riparian proprietor, has a prior claim to the water in the Mooi River for domestic use. For the purpose of irrigation he has at least an equal right with defendants. (*Heugh* vs. *Van der Merwe*, *Buch. Rep.*, 1874, p. 148; *Addison on Torts*, 5th edn., p. 244, p. 297.) The rights of the plaintiff being established, the defendants have diverted an unreasonable quantity of water from the river, to the loss of the plaintiff, whose crops have been seriously damaged. The plaintiff, moreover, had at different times no water for domestic use. Under the circumstances, he is entitled to substantial compensation in damages.

Buskes, for the defendant, Hendriks: The simple question is whether an unreasonable use of the water has been made, to the detriment of the plaintiff. When the plaintiff completed his water-course, the furrows of all three defendants already existed. (*Heugh* vs. *Van der Merwe*, *Buch. Rep.*, 1874, p. 154.) There is nothing to show that the plaintiff

was deprived of the use of the water by any acts of the defendant. Hendriks cannot be to blame, for his dam is above those of the other two defendants, and yet they have sufficient water for their mills. At the plaintiff's dam there is enough water left in the river; but, as he has taken out his furrow considerably above the level of the stream, the water will not flow freely into it. The plaintiff's own conduct has therefore produced the loss and damage which he has sustained. (He further referred to *Retief* vs. *Louw*, *Buch. Rep.*, 1874, *Appendix*; *Jordaan* vs. *Winkelman*, *Buch. Rep.*, 1879, p. 79.)

Van Eck, for Hoffman and Browne, argued that they had not diverted more water out of the river than was required for their mills. At the point where the furrow of Browne leaves the river, there is just enough water in it for his mill, and no more. The reason why water runs to waste above the mill-wheel is because water escapes from the furrow of the defendant Hendriks into that of Browne. The first defendant, therefore, is the wrong-doer. Hoffman has diverted but a small quantity of water from the river; and were it not for waste water, which he catches up from the furrows above his own, he would not be able to drive his mill. Damage has been caused to the plaintiff's crops by hail-storms, and not through any acts of the second and third defendants.

Kleyn, in reply.

Postea.

Kotzé, J.: This is an action for a declaration of rights, damages, and a perpetual interdict. The facts of the case are briefly these. The plaintiff is the owner of the farm Vijfhoek on the Mooi River, a public stream, and also of a portion of the farm Rietfontein adjoining Vijfhoek. The defendants are mill-owners on the opposite side of the river, and lead water from the Mooi River on to their respective mills by means of furrows through land belonging to the Municipality of Potchefstroom. The defendants, therefore, are not riparian proprietors, although for the purpose of this action I will suppose that as between them and the

1880.
June 1.
" 2.
" 6.
Sept. 9.

Baillie vs. Hendriks, Hoffman, and Browne.

plaintiff the same principles of law apply, which regulate the user of the water of a public stream by riparian proprietors. I desire, however, to express no definite opinion on this point. The evidence shows that the defendants divert water in different furrows from the Mooi River above the dam and furrow of the plaintiff. In dealing with the water of a public stream, a distinction must be drawn between the ordinary and the extraordinary use of water. The ordinary use of the water by a riparian proprietor is that which is required for domestic use and the support of animal life; the extraordinary use consists in the application of the water for agricultural purposes, the driving of machinery, and the like. If an upper proprietor, on either side of the river, in the reasonable exercise of the ordinary use, requires all the water in the stream, the lower proprietor will have no redress; but the case is different in the exercise of the extraordinary use of the water, for here an upper proprietor can only exercise his right to the extraordinary use consistently with a similar right in the lower proprietor. The defendants, therefore, cannot divert all the water to their respective mills, if by so doing the lower proprietors, *i.e.*, the plaintiff, is effectually deprived of water for irrigation, &c. It has been satisfactorily proved that all three defendants have diverted more water out of the river than they require for their mills, and this they are not entitled to do. Moreover, even if they have only diverted sufficient water for their mills they would still not be justified so to do if the plaintiff is thereby altogether deprived of water for irrigating his lands, for so far as the extraordinary use of the water is concerned the plaintiff has at least an equal right with the defendants. I am satisfied that if the defendants built proper walls, and had sluice-gates at the head of their respective furrows, regulating the quantity of water required, there would be sufficient water left in the Mooi River enabling the plaintiff to catch it up and divert it by means of his furrow on to the lands of Vijfhoek. With reference to the defendant Browne, the fact that his former partner Hamilton (during Browne's absence) made a new cutting, merely moving the head of his furrow above plaintiff's dam, does not free him from responsibility. Mr. Browne is using the water flowing in this furrow, and has

it in his power and control to prevent an excess of water entering his furrow to the detriment of the plaintiff after the fact was brought to his notice. The defendants, having diverted an unreasonable quantity of the water to the prejudice of the plaintiff, must be restrained from doing the like in future. The only question which remains for consideration is to what damage, if any, is the plaintiff entitled? No doubt a good deal of the damage sustained by the plaintiff in his crops was caused by hail-storms, and is not altogether to be ascribed to the diversion of the water by the defendants. At the same time it is sufficiently established that the plaintiff's furrow has been considerably damaged through the water not being allowed to flow freely into it, and the plaintiff has also been injured in his ordinary use of the water for domestic purposes. Under all the circumstances of the case, I think that *each* of the defendants must be ordered to pay to the plaintiff the sum of £25, as and for damages sustained, together with one-third of the taxed costs of suit.

BOTHA, SMIT, AND OTHERS *vs.* KINNEAR.

Deed of Sale.—Transfer.—Servitude.—Undivided Farm.—Joint Owners.—Damage.—Interdict.

The mere reference in a transfer of land to a deed of sale, granting the right of grazing, &c., over adjoining land, is not sufficient to create a servitude as against a third party, who is a purchaser for value.

A joint owner of an undivided farm is not entitled, as against the other co-owners, to convert pasture into arable land, nor to build upon such pasture land, nor can he indiscriminately cut down old and young trees on the farm. These are acts which may be restrained by interdict.

If the other co-owners first suffer an alteration to be made, and then after its completion seek to have the alteration removed, the application comes too late, and they must

rest content with their claim to be indemnified by the defendant for any loss or infringement of their rights caused thereby.

1880.
June 5
Sept. 9.

Botha, Smit, and others vs. Kinnear.

Action for a perpetual interdict, restraining the defendant from ploughing and sowing upon the pasture land of the farm Witrand, in the district of Potchefstroom, and from cutting wood on the said farm. The summons likewise prayed that the defendant may be ordered to remove all buildings erected by him on the pasturage of the said farm.

The plaintiffs own different portions of the farm Witrand. The portion held by the plaintiff Bosman is defined and surveyed. The remainder of the farm was divided by the late Jan Lodewijk Kruger into seven portions among his children in the following manner:—The arable land and building site, for one of the sons, was marked off by the father on the northern portion of the farm Witrand, and enclosed by a wall. The building sites and arable lands for the six other sons were marked off together on another portion of the farm, and these lands are likewise enclosed by walls. Over the rest of the farm all the sons had equal rights, being joint owners thereof. The plaintiffs, Botha and Smit, ultimately, by purchase, became possessed of one of these seven portions, including the arable lands in the northern part of the farm, and the defendant, Kinnear, subsequently became owner, also by purchase, of the remaining six portions of Witrand. The transfer of 5th August, 187 , in favour of Botha and Smit, states that they are owners of one-seventh *undivided* share of the farm Witrand, and the transfers—six in number—to Kinnear, are in each case of one-seventh *undivided* share of the farm. When the defendant entered into possession of his portion of the farm, Botha and Smit were already in occupation. The defendant, at different times, sold part of his interest to Koekemoer (another plaintiff); thus, by deed of sale of the 21st July, 1878, he sold a portion of the arable lands, buildings, &c., to Koekemoer, with the right of grazing over the farm Witrand, and by deed of sale of the 24th January, 1879, he sold the northern portion of Witrand to Koekemoer, with the right of free grazing for cattle, &c.

Koekemoer, in turn, sold portion of what he bought to the plaintiff Du Plessis. The plaintiff, Bosman, is owner of a defined and surveyed portion cut off from the original farm Witrand. All these different plaintiffs now maintained that they have the right of free grazing for their cattle on the farm Witrand, and that the defendant is not entitled (as the evidence shews he has done) to make and cultivate new lands and erect buildings on what was always considered the best portion of the farm for winter grazing.

Kleyn, for the plaintiffs. The plaintiffs are owners of undivided portions of the farm Witrand, and as such, they have the right of free grazing over the whole farm. The defendant, as co-proprietor of a farm held in common, can not plough up the pasture land, cut down trees, and build upon the pasturage. *Addison on Torts*, p. 392, p. 372, 5th edn. The plaintiffs are, therefore, entitled to an interdict restraining the defendant from continuing the acts complained of. The defendant is bound to remove the buildings which he erected on the pasture land.

Zeiler, for the defendant, The plaintiff Bosman, being owner of a defined portion of the farm, can have no right of action against Kinnear. Bosman's transfer says nothing about a right of grazing over the farm. This servitude is not registered as required by law. When the defendant sold to Koekemoer, the new lands complained of were under cultivation. Koekemoer, therefore, can not object to that which already existed before he became a purchaser. The new lands are below, or under the common water-furrow of the farm. Therefore, the defendant has simply ploughed up what was always destined to be used as arable land, and not as pasturage. The three essentials for an interdict laid down by *Van der Linden* do not exist. There is no satisfactory evidence that the defendant has committed waste. He merely cut down a few young trees.

Cur. adv. vult.

Postea (Sept. 9th).

Judgment was now delivered by

1880.
June 5.
Sept. 9.

Botha, Smit, and others vs. Kinnear.

KOTZÉ J.: It will be advisable to deal with the claim of each plaintiff separately. As regards the plaintiff Bosman, it appears from the transfer that he owns a well-defined, surveyed, and divided portion of the original farm Witrand. The defendant is a purchaser for valuable consideration, and neither in the plaintiff's transfer, nor in those of the defendant, is any mention made of a right of grazing or cutting wood over the undivided farm Witrand, in favour of the owner of the defined portion now held by Bosman. The law is strict on this point, and does not presume in favour of servitudes. The mere general expression in Bosman's transfer, "and further with the rights more fully described in the deeds of sale between Johannes Lodewyk Kruger, senr., and the late Mr. Stephanus Bekker," is not sufficient to create or transfer to Bosman, as against Kinnear, a real servitude of grazing, &c., over the remaining portion of the farm Witrand (*vide Steele* vs. *Thompson*, 13 *Moo. P.C.C.*, 280, *et seq.)*; and I would strongly urge upon conveyancers in this Province the necessity of inserting all servitudes over immovable property in the deed of transfer itself, instead of merely referring in the transfer to the deed of sale. The plaintiff does not allege that he is owner of an undivided share; on the contrary, his transfer shows that he holds a divided portion cut off from the rest of the farm, and the mere fact that formerly the cattle of the owner of this divided portion always ran on that part of the farm now cultivated by defendant is not sufficient to restrain the defendant, in the absence of any grant or prescription, from dealing with the land as he has done So far as Mr. Bosman's prayer is concerned, I must absolve the defendant from the instance, but make no order as to costs. As regards the plaintiffs, Botha and Smit, they allege, and have proved, that they bought one *undivided* seventh share of the farm Witrand, and accordingly have equal grazing and other real rights over the farm with the defendant, who purchased the remaining *undivided* six-seventh portions The plaintiff Koekemoer again purchased all the arable lands within the enclosing walls, which were originally given by the late Mr. Kruger to his six sons, and also obtained from defendant by express grant the right of grazing, cutting wood, &c., over the farm.

Now it is clear that, inasmuch as Kinnear was at that time a joint owner of the farm with Botha and Smit, he could only sell to Koekemoer such rights as he possessed *qua* joint owner, and not as owner in severalty; consequently Koekemoer must be considered also as a joint owner of the farm. The same principle will apply to the plaintiff Du Plessis, who bought portion of the rights which Koekemoer obtained from Kinnear, the defendant. I am aware that a dispute exists between Koekemoer and the defendant, as to whether, by a certain deed of sale of 24th January, 1879, the former purchased all the remaining right and interest of the latter in the farm Witrand, but that dispute does not affect the present question, and unless Koekemoer bases his claim on the assumption that he is a joint owner with defendant, he is out of Court in this suit. The evidence, both oral and documentary, shows that with the exception of the building sites and enclosed arable lands, the farm was always held in common, and I must hold that the plaintiffs Botha and Smit, Koekemoer and Du Plessis, are joint owners with the defendant of undivided portions of the farm Witrand. It has been proved that the defendant has ploughed up and cultivated the best, if not the only winter pasturage on the farm, and that he has done so to a very large extent. He has also erected new buildings upon the pasture land of Witrand, and indiscriminately cuts down old and young trees, so much so, that one witness stated there are no more large trees on the farm. These are acts which a joint owner is not justified in doing upon land held in common, and he may be prevented from so doing by anyone of the joint proprietors. The other joint owners, however, must be active in their objection, for if they first suffer an alteration to be made by the defendant, and then, after its completion, seek to have the alteration removed, the application comes too late, and they must rest content with their claim to be indemnified by the defendant for any loss or infringement of their rights caused thereby. (*Dig.* 10, 3, 28; *Huber, Praelect.*, 10, 3, 4; *Voet* 10, 3, 7; *Gluck*, 10, 3, § 793.) From the evidence it appears that some time before the summons was issued the new lands were already made by defendant, and the buildings on the pasturage completed. I cannot, therefore, order the de-

1880.
June 5.
Sept. 9.

Botha, Arnit, and others vs. Kinnear.

fendant to remove the buildings already erected, nor to abandon the new lands actually under cultivation; but the defendant must be restrained by interdict from continuing to convert pasture land into arable land, and from building or placing other obstructions on the pasturage of the farm Witrand. With reference to the cutting of trees, the defendant and his servants must be restrained from cutting trees on the said farm in a manner, or to an extent, injuring the plaintiffs in their rights as joint proprietors. It is much to be regretted that the plaintiffs have not brought an action for partition of the farm, as nothing but a partition will satisfactorily settle the disputes between them and the defendant. The plaintiffs have substantially succeeded in their action, and the defendant must pay the taxed costs of suit.

Du Toit *vs.* Hudson.

Inspectors' Instructions, 1861, § 12.

The Inspectors' Instructions of 1861, *as far as the granting of adjoining land in lieu of an outspan over a farm is concerned, do not relate back to farms inspected in* 1853, *and over which farms outspans were at the time created for the public benefit.*

1880.
Aug. 3.

Du Toit vs. Hudson.

Action for the issue by the Government of a proper title in favour of the plaintiff of a certain piece of land adjoining the farm Doornpoort, in the district of Rustenburg. The summons set forth that the plaintiff, "being the owner of the farm Doornpoort aforesaid (which was transferred to him on the 5th day of June, 1855), he, in or about the year 1861, under and by virtue of the then existing Instructions for Inspectors (published in the *Gazette* of 1st February, 1861), applied to, and obtained from, the Inspectors Sarel Eloff, Philippus van der Walt, and Jacobus Nel, a piece of the then Government land of one thousand morgen, or thereabouts, on the north side of the said farm Doornpoort, in place of an outspan *(uitspanning)* which was measured off for public use on the said farm in or about the year 1853.

And the plaintiff further saith that he has often applied to the Government aforesaid for the issue to him (under section eighteen of the ordinance establishing an office for the Registrar of Deeds, A.D. 1866) of a proper title to the said piece of Government land, upon payment by him, the plaintiff, of all dues and charges connected therewith, but that the said Government refuses so to do."

The defendant, as Colonial Secretary, excepted that the summons "is bad in law, on the ground that the acts, matters, and things in the said summons alleged and set forth, do not disclose, or give rise to, any right of action on the part of the plaintiff against the defendant."

Morcom (Attorney-General), with him *Meintjes*, in support of the exception. The original inspectors of Doornpoort laid down an outspan on that farm. In 1855 Doornpoort was transferred to Du Toit. Six years later, the Inspectors proceeded to inspect a piece of land for Du Toit in order to make up for the outspan created in 1853. This the Inspector had no right to do. The instructions for Inspectors of 1861, § 12, do not give the right to the plaintiff of claiming a piece of land in lieu of a servitude created on his farm, which had already been inspected years before. If additional ground is given to make up for the outspan on the farm, this must be done at the time of inspection. (*Arg.* § 215 *Grondwet.*). The Inspectors must be guided solely by the published instructions. There is no allegation in the summons that the Inspectors had special authority to assign a piece of land, 1,000 morgen in extent, to the plaintiff.

Ford, with him *Preller*, for the plaintiff. The summons sets forth a sufficient *prima facie* case. The Inspectors acted according to the instructions of 1861, which did not prohibit them from inspecting a piece of land to make up for the creation of a servitude of outspan on the plaintiff's farm, as stated in the summons. Section 12 of the Instructions does not say that when land is given to a farm in lieu of an outspan created over it, this must be done at the time of inspection and not subsequently.

1880. Aug. 3. — Du Toit vs. Hudson.

The COURT held that the instructions of 1861 did not refer back to farms inspected in 1853. The exception was, therefore, allowed with costs.

Ex-parte PRELLER & DE VILLIERS & TAYLOR.

Surrender of Debtor by his Bail.

The Sheriff is bound to receive into custody a debtor, surrendered to him by the sureties, in terms of a Bailbond.

1880. Aug. 18. — Ex parte Preller & De Villiers and Taylor.

This was an application in Chambers under the following circumstances.

One Thomas Bond had been arrested and held to bail at the instance of T. A. Le Mesurier, Assistant Commissary-General, who claimed the sum of £2,788 3s. as due from Bond to the Commissariat Department. The applicants entered into a bailbond with the Sheriff, who had arrested the said Thomas Bond, on the usual condition that if the said Thomas Bond appeared personally, or by attorney, to answer the action against him at suit of T. A. Le Mesurier, and also shall abide and perform the judgment of the Court thereon, or render himself to the prison of the said Court in execution thereof, the obligation to be void, otherwise to remain in full force. Judgment was in due course pronounced against Thomas Bond in the action with costs. The applicants stated in their petition "that they were ready and willing, and had offered, to render the said Thomas Bond to the prison of the Court, but that the Sheriff had refused to take the said Bond to prison without an order of Court."

Cloete, in support of the application, referred to *Addison on Torts*, 4th edn., p. 582; *Mayne on Damages*, 2nd edn., p. 247; *Wharton's Law Lexicon in verb Bail. Erskine's Institutes*, bk. 3, tit. 3, § 73, *in notis*; *Nassau La Lecq.*; *Algemeen Reyister*, p. 96.

Korzé, J., ruled that the Sheriff was bound to receive into custody, under the writ of arrest, the person of Thomas Bond, the debtor, upon his being delivered up and surrendered to the Sheriff by the applicants, who are his bail.

1880. Aug. 18. Ex parte Preller & De Villiers and Taylor.

Ex parte Bok.

Preliminary Examination.—Perpetual Silence.

Where a preliminary examination was kept open for seven months against an accused person, who had been admitted to bail; Held, that a decree of perpetual silence could not be granted against the Crown.

1880. Aug. 10. Ex Parte Bok.

The petition of W. E. Bok set forth that on the 3rd January, 1880, he was arrested upon information of N. J. R. Swart, charging him with the crime of treason; that a search warrant was at the same time issued by the Landdrost of Pretoria, in consequence whereof a box, containing several documents and minutes belonging to the Boer Committee, and entrusted to the applicant for safe keeping in his capacity as secretary of the said Committee, was seized and taken from his dwelling house; that a few days afterwards a preliminary examination was held before the Landdrost of Pretoria, which examination was neither concluded nor subsequently proceeded with, nor was the applicant committed for trial or formally discharged. The applicant had, on the 3rd January, been admitted to bail, himself in £1,000, and two sureties in £1,000 each. On the 4th August the applicant's attorney directed a letter to the Attorney-General requesting the return of the box containing the documents, on the ground that the time for the prosecution of the charge had lapsed. The Attorney-General replied that the box might be returned, but he was unwilling to part with the documents therein contained.

The applicant now prayed that the Attorney-General may de directed to return the said documents to him, and be barred from further prosecution of the case, and put to perpetual silence, &c.

1860.
Aug 10.

Ex parte Bok.

Jorrisen, with him *Cooper*, in support of the application. The applicant asks to have his property restored and the sword of Damocles removed from over his head. The Criminal Procedure, § 70, requires that all accused persons shall be brought to trial within six months after the conclusion of the preliminary examination. The Attorney-General cannot prolong the preliminary examination at his pleasure, but ought either to direct the committal of the accused or his discharge, § 57 *Crim. Proced.* The spirit of English Law is entirely in favour of this contention. *Habeas Corpus Act, Stephen's Com. on Laws of England* vol. 4. The prosecution has had seven months to read the papers, and no decision has as yet been arrived at.

De Wet, C. J., held that it would require a very strong case to justify interference with the Attorney-General in the discharge of his duty. No authority has been cited to show that where a preliminary examination has not been closed the accused is entitled to a decree of *perpetual silence* against the Crown. The accused has not been committed for trial, nor is he deprived of his personal liberty. Inspection of the documents in the box has neither been asked nor refused, and if the applicant is advised that the Attorney-General is in unlawful possession of the papers, he has his remedy against that officer. The application must be refused.

Kotzé, J. concurred.

Ex parte Hudson.

Arrest.—Public Officer leaving the Jurisdiction on Leave of Absence.

The Orphan Master had obtained three months' leave of absence to proceed to Europe. On the morning of his departure an application was made in Chambers by the Colonial Secretary for the arrest of the Orphan Master, on the ground that the books and accounts of his office had not been audited. The application was refused.

1850. Aug. 18.

Ex parte Hudson.

Application in chambers for a writ, restraining H. C. Bergsma, Orphan Master of the Transvaal Province, who had obtained leave of absence, from proceeding beyond the jurisdiction of the Court or the limits of the Province. The affidavit of the applicant (who is the Colonial Secretary), sworn on 18th August, set forth that H. C. Bergsma "filled the office of Orphan Master, one of great trust and responsibility, involving the receipt and payment of large sums of money: That the accounts of the said office have not been audited for some time past, and that H. C. Bergsma had left his office, preparatory to leaving by the coach for Kimberley, this day, and without his accounts being audited according to official custom: That the said H. C. Bergsma had been requested to abandon any intention of leaving Pretoria until such time as his accounts had been duly audited: That the absence of the said H. C. Bergsma will materially prejudice the inquiry into the accounts of his office." It further appeared that three months' leave of absence had been duly granted by the Government to the Orphan Master, to commence from the 14th August, without any condition as to a prior special audit of his accounts before his departure from the Province. Monthly statements of account had, in the usual course, been forwarded by Mr. Bergsma, as Orphan Master, to the Auditor-General, who did not question the accuracy of such statements. Acting on the leave granted him, Mr. Bergsma had secured through passage for himself and family from Pretoria to Port Elizabeth, and left Pretoria early on the morning of 18th August. Previous to his departure for Europe on urgent private affairs, Mr. Bergsma had, through his attorney, offered to place in the Standard Bank the sum of £2,000, being the amount of the security bond executed upon his appointment as Orphan Master.

Morcom (Attorney-General), in support of the application. The Orphan Master, holding a position of trust under the Crown, cannot leave before his books and accounts have been audited. A person entrusted with a special mandate must give an account when demanded. *Grotius* (Maasdorp's edn.), p. 356; *Van der Linden* (Henry's edn.), p. 244. A writ analogous to *ne exeat regno* is prayed. (*Snell's Prin-*

1880. Aug. 18. Ex parte Hudson.

ciples of Equity, p. 505.) The Orphan Master is the only person who can furnish proper and material information as to the accounts of his office. The Rules of the Service require the Orphan Master to render account and have his books audited before leaving. The interests of the public are concerned. (Counsel further referred to *Smith's Manual of Equity*, p. 458; 32 & 33 *Vict.* c. 62, § 6; 49 *L. J. Ch.* 37; *Weeswet*, § 47, § 67, *et seq.*

Cooper asked leave to oppose the application. The Government was aware that Mr. Bergsma had obtained leave on the ground of urgent private business in Holland. He was permitted to make all the necessary preparations for his journey, and now that he has started with his family it is sought to have him arrested. There is no *prima facie* proof that the books in the Orphan Chamber are not correct. It is merely alleged that there may be a possibility of discovering errors in the accounts. It was the duty of the Government, and not of Mr. Bergsma, to have the accounts of the Orphan Chamber audited.

KOTZÉ, J.: There exists no sufficient reason for arresting Mr. Bergsma and preventing him from leaving the Province. There is no allegation that he has misappropriated the funds and money in his office, nor that any deficiency has been discovered in his books, rendering Mr. Bergsma civilly liable to the Government. He left Pretoria after his leave of absence had commenced to run, and no authority has been cited justifying his arrest. The application must be refused.

Ex parte ZEILER.

Interdict granted restraining the transfer or mortgage of immovable property by the registered owner thereof.

1880. Aug. 27. Ex parte Zeiler.

Application in Chambers for an interdict restraining A. B. from alienating or mortgaging his immoveable property.

The affidavit of Zeiler set forth that A. B. was indebted to him in the sum of £560, which sum, although frequently demanded of him, the said A. B. had neglected to pay. Upon A. B. contemplating departure from the Province for England, Zeiler threatened to have him arrested and held to bail, whereupon A. B. stated he had left full power with one C. to settle the debt of £560. After departure of A. B., Zeiler discovered that no such power had been left with C. The debtor had proceeded to Europe with the avowed intention of selling his landed property in the Transvaal.

Cloete, in support of the motion, referred to *Civ. Procedure* 1874, § 55.

KOTZÉ, J., granted an interdict restraining A. B. from alienating or mortgaging his immoveable property, viz., the farm Weilaagte, No. 172, situate in the district of Pretoria, pending the further order of the Court, or a Judge in Chambers.

CONRADIE *vs.* DUNELL, EBDEN, & Co.

Pleading in Landdrost Court.—Description of Plaintiff and Defendant.

Plaintiffs sued in the Landdrost Court as "Dunell, Ebden, & Co., of Port Elizabeth," and described the defendant as "F. W. Conradie, of the farm Modderfontein, in the district of Rustenburg;" Held that as the identity of the parties was sufficiently established, and no prejudice had been occasioned to the debtor, the plaintiff and defendant had been sufficiently described in the summons.

The Court does not scrutinize too closely the pleadings in the Landdrost Court, as long as substantial justice has been done.

1880.

Oct. 14.
" 15.
Conradie vs. Dunell, Ebden, & Co.

Appeal from the judgment of the Landdrost of Rustenburg. In the Court below the respondents sued the appellant on a promissory note for £129 2s. 6d. The summons in the Landdrost Court was in the following form. "Summon F. W. Conradie, whose full name is to the plaintiff unknown, agriculturalist, residing on the farm Modderfontein, in the district of Rustenburg, that he appear, &c., to answer Dunell, Ebden, & Co., of Port Elizabeth, &c." The defendant (now respondent) excepted that the summons did not state the full name of the defendant nor of the plaintiffs, carrying on business in partnership as Dunell, Ebden, & Co. The Landdrost overruled the exception, and gave judgment in favour of Dunell, Ebden, & Co.

Cloete, for the appellant, cited *Farmer* vs. *Owen*, 1 *Menz.*, 124; *Noorden* vs. *Hoole*, 1 *Menz.*, 125; *Rens* vs. *Heydenryck*, *ib.*; *Van der Linden*, bk. 3, pt. 1, ch. 2, § 6; *Grondwet*, § 146.

Hollard, for the respondents. The defendant has not been prejudiced by the alleged insufficient description. *Civ. Procedure*, 1874, § 9; *Buck* vs. *Eksteen*, 1 *Menz.*, 475; *King* vs. *De Villiers*, 1 *Menz.*, 292.

Cloete, in reply, referred to *Lolly* vs. *Gilbert*, 1 *Menz.*, 434; *Voet*, 17, 2, 16; *Lindley on Partnership*, vol. 1, p. 483, (3rd edn.); *Chitty on Pleading*, vol. 1, pp. 12-13, (5th edn).

De Wet, C. J.: The same accuracy and technicality in pleading in the High Court are not required in the lower Court. Our first object is to see that substantial justice has been done by the Landdrost. The defendant has not been prejudiced, and the identity of himself and the holders of the note, who sued him, were sufficiently established. (*Visagie* vs. *Booysen*, *Buch. Rep.* 1869, p. 317.) The appeal must be dismissed with costs.

PAGE *vs.* HUDSON.

Sale.—Exemption from Transfer Duty.—Illegality.

Plaintiff bought a farm at auction from the Government upon condition that he was not to pay transfer duty. He subsequently paid the purchase price. In an action to compel transfer of the farm from the Government; Held, upon exception to the summons, that the condition under which the farm was sold was tainted with illegality, and that the exception was well taken.

1880. Oct. 19. — Page vs. Hudson.

Action against the Colonial Secretary for transfer in favour of the plaintiff of a certain farm, &c. The summons set forth "That on the 20th day of February, A.D. 1877, and at Marthinus Wesselstroom, in the then South African Republic (now the province of the Transvaal), plaintiff was present at a public auction held by the Sheriff of the district of Wakkerstroom, for and on account of the Government of the then South African Republic, of the farm Langfontein, situate in the district aforesaid: That previous to the commencement of the said auction certain conditions of sale were read out by the auctioneer (the said Sheriff), copy of which is hereunto annexed, and which the plaintiff prays may be considered as inserted herein; from which it will appear that the said farm was sold under the special condition that no transfer dues were to be paid by the purchaser, and under this condition the said farm was bought by plaintiff for the sum of £651 (as will more fully appear from a certificate of the then Landdrost of Wakkerstroom, and of the Sheriff aforesaid, hereunto annexed and marked B. and C.) That plaintiff has duly fulfilled the conditions of sale hereinbefore mentioned, and paid to the Government the full amount of the purchase price. That the plaintiff has often applied to the defendant, N.O., to pass transfer of the said farm upon the name of the plaintiff, which, however, he had neglected and refused to do. That by reason of the refusal to pass transfer of the farm as aforesaid, plaintiff has sustained damage and suffered

1880.
Oct. 19.
—
Page vs. Hudson.

loss to the amount of £200. Wherefore the plaintiff prays that by judgment of this honourable Court the said defendant, N.O., may be ordered to pass and deliver transfer of the said farm to the plaintiff in terms of the conditions of sale aforesaid; and further, to pay to the plaintiff the sum of £200, as and for damages had and sustained as aforementioned, with costs of suit."

The defendant took the following exceptions: "That the said summons is bad in law, in that the alleged contract, under which the plaintiff claims transfer of the farm Langfontein without payment of *heerenregt* or transfer dues, is illegal, and null and void in law: That the claim for £200 damages is bad in law."

Morcom (Attorney-General), with him *Ford*, in support of the exceptions. The provisions of the law which impose upon the purchaser the payment of transfer dues—a public tax in aid of the revenue—cannot be dispensed with by the Government. *Grondwet*, § 191.

Hollard, with him *Cloete*, *contra*. The summons discloses no illegality in the contract between the plaintiff and the Government. The object of the condition, exempting the purchaser from the payment of transfer dues, was to obtain the best possible price. This was in the interests of the public revenue. *Grondwet*, § 188.

De Wet, C. J.: The Government, as alleged in the summons, could not exempt the plaintiff from the payment of transfer duty—a public tax enjoined by law upon the purchaser. The condition under which the farm was offered for sale is void for illegality. The exception must be upheld, with costs.

D'Arcy *vs.* Skinner and Green.

Election of Municipal Councillors.—Law No. 16, 1880.

A burgess of Pretoria, Lambertus G. Vorstman, Sodawater Manufacturer, was described on the burgess roll as C. Wisman, Sodawater Manufacturer. At an election of Borough Councillors he filled in his voting card as follows: "Lambertus G. Vorstman (C. Wisman), Sodawater Manufacturer, &c." Held that as the Polling Officer had satisfied himself as to the identity of the burgess, his vote had not been improperly received.

Act 16, 1880, § 27, *does not prescribe that a voter must personally sign his voting card, but only himself hand it in to the polling officer.*

Section 27 *of the Act does not require a voter to state his occupation on his voting card, but only his description.*

1880.
Nov. 18.
„ 19.

D'Arcy vs. Skinner and Green.

Motion to set aside the election of respondents, as Councillors for the Borough of Pretoria, under Law No. 16, 1880. The petition of applicant was as follows: "That your petitioner was a candidate at an election of Councillors for the Borough of Pretoria, held under the provisions of Law No. 16, 1880, at Pretoria aforesaid, on the 25th day of October last, for Ward No. 2 of the said Borough. That the other candidates for the said Ward were Robert Cottle Green, William Skinner, and Goosen Johannes Verdoorn That at the close of the poll the said Robert Cottle Green and William Skinner were declared duly elected as Councillors. The votes given to each candidate being declared to be as follows, viz.:—

Green	...	...	52.
Skinner	...	...	49.
D'Arcy	...	...	47.
Verdoorn	..	...	16.

1. That three of the voters who voted for the said Robert Cottle Green, namely, J. Higgins, Charles Cullingworth,

1880.
Nov. 18.
" 19.

D'Arcy vs. Skinner and Green.

and William Bales, voted twice over, contrary to the provisions of the said law, having already, and at a separate hour, voted for your said petitioner, and having thereby exhausted their voting power. 2. That a voter, who voted for the said Robert Cottle Green, and also for the said Goosen Johannes Verdoorn, appears on the burgess roll of the said Borough as C. Wisman, his actual name being Lambertus G. Vorstman. The said Lambertus G. Vorstman voted, but he added by way of description the name C. Wisman in brackets. The words C. Wisman are not the proper signature of Lambertus G. Vorstman, and are therefore surplusage, while his proper name of Lambertus G. Vorstman does not appear on the burgess roll of the said Borough. 3. That a voter, named G. H. Bindon, who voted for the said Robert Cottle Green, did not state his place of abode on his voting paper as required by law. 4. That a voter named Lovell Taylor voted for the said Robert Cottle Green and William Skinner, and his vote was recorded for them in the book provided for that purpose, as that of Lovel Taylor; subsequently, at a separate hour, he voted again for the said Robert Cottle Green and William Skinner, and on his second vote being objected to by your petitioneer's scrutineer, the said Lovell Taylor stated that on the first occasion he delivered the voting card of another voter, named Evitt Saunders; contrary to the provisions of the said law, which requires that the voter shall himself deliver the voting paper to the returning officer. Both the said votes were improperly allowed, and the name Lovell Taylor, where it first appeared, was improperly altered into Evitt Saunders. Your petitioner respectfully submits that, in view of the circumstances, neither of the said votes should have been allowed. 5. That a burgess, D. Clark, did not, as voter, himself sign his voting card in favour of the said Robert Cottle Green as required by law; and that the burgesses D. Jackson and H. Williams did not themselves sign their voting cards in favour of the said William Skinner. 6. That your said petitioner has also discovered that Patrick Tewhy, who voted for Robert Cottle Green, has not stated his occupation on his voting card as required by law.

" Wherefore, your petitioner prays your Lordships that he may be declared to be duly elected a Councillor of the said

Borough for Ward No. 2 thereof, or that the alleged election of the said William Skinner be declared null and void, and your petitioner declared duly elected instead of the said William Skinner; or that the alleged election of the said Robert Cottle Green, as Councillor of the said Borough for the said Ward No. 2, be declared null and void, and that your petitioner may be declared duly elected instead, &c."

The voting cards were in the following form:

Candidate	...	R. Cottle Green.
Name	...	Lambertus G. Vorstman (C. Wisman).
Occupation	...	Sodawater Manufacturer and Wine Merchant.
Residence	...	Pretorius Street.

Cooper, in support of the motion. A voter having handed in one voting card, can not, at a subsequent hour, vote for another candidate by means of another card. The names of both candidates voted for must be on one card. *Reg.* vs. *Tait*, 5 *Jur., N. S.* 679. *Lumley's Public Health Act*, p. 356-7, note f. (In further support of the objection, he cited *King* vs. *Marsh*, 6 *Ad. and Ell.* 251.) As to the second objection, Law No. 16 of 1880, § 14, requires the Christian and surname of each voter to be stated in full. Section 27 requires that each voter shall vote by his name as figuring on the burgess roll. Lambertus G. Vorstman did not vote by the name on the burgess roll, but as Lambertus G. Vorstman. *Reg.* vs. *Tugwell, L. R.* 3, *Q. B.* 704, *per* Blackburn, J., *Cape Div. Council Act*, 1865, § 32. Thompson, for instrnce, can not vote as Jones, nor can Wisman vote as Vorstman. *Reg.* vs. *Thwaites* 17, *Jur.*, 212, shews that the name must be similar. In that case the Christian name alone was different, here both Christian and Surnames are different. There is nothing to prove that a burgess of the name of C. Wisman, Sodawater Manufacturer, does not exist. A variance in the name is material, unless it be *idem sonans*. *Richter* vs. *De Kock*, 1 *Menz.*, 107; *Brink* vs. *Napier*, 1 *Menz.*, 119; 3 *Chitty's Statutes*, 522 *(Parliamentary Registration Act*, note *b)*; *Reg.* vs. *Coward*, 15 *Jur.*, 728. As to the third and sixth objections, *Reg.* vs *Tugwell, L. R.* 3., *Q. B.*; *Reg.* vs. *Coward*, 15 *Jur.*, 726; *Reg.* vs. *Hammond*, 16 *Jur.*, 195; *Reg.* vs. *Dighten*, 8 *Jur.*, 686; 1

1880.
Nov. 18.
" 19.

D'Arcy vs. Skinner and Green.

Chitty's Statutes 973, § 32. As to the fourth objection, § 27 of the Act requires that the voter must personally present his voting paper. As to the fifth objection the Act prescribes that the voting paper must be signed by the voter, and not merely with his name as under the English Statute.

Hollard, contra. The first objection is untenable. *Van der Linden* 61-2; § 29 of the Act gives the voter a right at any time between the hours of 8 a.m. and 4 p.m. to record his vote. That which is not prohibited is permitted. No authority has been cited to shew a voter must record his two votes at one and the same instant of time. As to the second objection, *Reg.* vs. *Thwaites*, 17 *Jur.*, 712, is in our favour; and as to the third objection, *Reg.* vs. *Avery*, 17 *Jur.*, shews a slight omission is not material. *Reg.* vs. *Tugwell, L. R.* 3, *Q. B.* 704; *Mather* vs. *Browne, L. R.* 1, *C. P. Div.* 596; *Reg.* vs. *Plenty, L R.* 4, *Q. B.* 346. The further objections that the voting cards were not signed personally by the voters, or delivered by them to the polling officer, can not be maintained. *Qui facit per alium facit per se.* The sixth objection is that a voter named Tewhy did not state his occupation on his voting paper. What evidence is there that Tewhy has any occupation? Section 27 of the Act merely requires the description of the voter, not necessarily his occupation.

Cooper, in reply.

De Wet, C. J., held that as Law No. 16, of 1880, § 27, only requires the description of the voter to be stated, and not also his occupation, as alleged in the petition, no legal ground of objection as to the vote given by Tewhy for the respondents has been shewn. The fifth objection raised by the petitioner is untenable. Section 27 of the Act is complied with if the voter authorises another to sign his name for him, but himself delivers the voting card to the polling officer. The fourth objection is virtually disposed of, for from the affidavit it appears that Evitt Saunders personally handed in his voting card. The second objection is likewise untenable. The burgess Lambertus G. Vorstman, who is described upon the burgess roll as C. Wisman, Sodawater Manufacturer and Wine Merchant, voted not as Lambertus

G. Vorstman, but as C. Wisman, and the words Lambertus G. Vorstman may be considered as surplusage. The voter voted by the name intended for him on the burgess roll, and the polling officer having satisfied himself as to the identity of the voter, the Court can not interfere, unless it be shown that another person of the name of C. Wisman, Sodawater Manufacturer, &c., exists different from the voter Lambertus G. Vorstman. *Reg.* vs. *Thwaites*, 17 *Jur.*, 712. As to the first and third objections, even assuming these objections to be good in law (as to which I express no opinion), the respondents would still have a majority of votes over the applicant, for these two objections only go against the return of the Respondent Green, and leave the election of the respondent Skinner untouched. Even if these objections be accepted, and four votes consequently deducted from the total in favour of Green, he would have 48 votes against 47 polled in favour of the applicant. The application must be refused with costs.

1880.
Nov. 18.
" 19.

D'Arcy vs. Skinner and Green.

KOTZÉ, J., concurred.

THE QUEEN *vs.* HONEY.

Theft by a debtor, whose estate had been compulsorily sequestrated under Roman Dutch Law, of property left in his custody by the Curators of his sequestrated estate.

The indictment set forth that on or about the 13th day of November, A.D. 1879, and at the farm Eenzaamheid, in the district of Middelburg, in the Transvaal Province, he, the said James William Honey, did wrongfully and unlawfully steal two wagons and thirty-two oxen, and one horse, the property or in the lawful possession of Edward Fleming Simpson, and Charles Andreas Celliers, curators of the sequestrated estate of the said James William Honey, duly appointed by the High Court, on 24th October, 1879.

1880.
Nov. 30.

The Queen vs. Honey.

KOTZÉ, J., directed the jury that if they were satisfied the prisoner had handed over all or any of the property men-

1880. Nov. 30. — The Queen vs. Honey.

tioned in the indictment to the curators of his sequestrated estate, who had thereupon left the same with the prisoner for safe custody, and he had subsequently removed all or any portion of such property from the farm Eenzaamheid into the Orange Free State, he has thereby deprived the curators of the lawful possession of the property, and is by Roman-Dutch Law guilty of theft.

HARSANT *vs.* BECKER AND DE VRIES.

Promissory note signed by Agent.—Provisional Sentence.

Provisional sentence refused on a promissory note signed by M., as agent, in the name of B., the principal, no power of attorney in favour of the agent so to do being produced.

1880. Dec. 14. — Harsant vs. Becker and De Vries.

Morcom (Attorney-General) moved for provisional sentence on a promissory note for £1,725 2s. 7d., made and signed P. J. Marais, *q.q.* Becker, in favour of De Vries, and endorsed by P. J. Marais, *q.q.* De Vries. Counsel proposed to put in an affidavit by Marais that his power of attorney granted by Becker and De Vries, respectively, had been mislaid.

DE WET, C. J.: No power of attorney by Becker or De Vries authorising Marais to bind them has been produced. The affidavit cannot be admitted. If the power authorises Marais to sign promissory notes on behalf of his principals, as alleged, counsel can move on a subsequent day in case the power should be found. In the meantime provision must be refused.

Celliers *vs.* The Queen.

Seditious Libel.—Jurisdiction of Landdrost.

A Court of Landdrost has jurisdiction under the Criminal Procedure Act of 1864, *to try and punish a case of seditious libel; per* De Wet, C. J.

A Court of Landdrost has no such jurisdiction; per Kotzé, J.

1881.
April 11.
" 18.
" 30.

Celliers vs. The Queen.

Appeal from the sentence of the Landdrost of Pretoria. The appellant was charged in the Court below with the crime of having printed and published a seditious libel, upon an indictment presented by the Attorney-General. Exception was taken that the Landdrost had no jurisdiction to try the case. The exception was overruled, and, after hearing evidence, the Landdrost sentenceed appellant to one month's imprisonment and to pay a fine of £25.

Preller, with him *Hollard,* for the appellant. The crime of which Mr. Celliers has been convicted is a political one, and through the action of the Attorney-General, who referred the matter to the Landdrost, the appellant has been deprived of his right of trial by jury. This is contrary to the law and constitution. Under the *Grondwet,* § 163, the jurisdiction of the Landdrost is confined to petty cases. Seditious libel, as set forth in the indictment against the appellant, is clearly not such a petty offence within the contemplation of the *Grondwet.* The punishment for seditious libel in English Law is two year's imprisonment, and the Attorney-General cannot refer any criminal case at his pleasure to the Landdrost for his desision. The *Thirty-Three Articles,* § 9, clearly shows that a Court of Landdrost has no jurisdiction in a case of sedition. The punishment provided for this crime, which is a species of *verraad (perduellio),* is above the jurisdiction of the Landdrost.

Morcom (Attorney-General), with him *Cloete,* for the Crown. This appeal must be decided in accordance with the provisions of the local law, and not by reference to the principles of English law. There were many difficul-

1881.
April 11.
" 18.
" 20.
Celliers vs. The Queen.

ties and technicalities connected with the case, and hence the Attorney-General prosecuted in person in the Court below. Under the Criminal Procedure Act of 1864, § 1-3, and the Criminal Procedure Amendment Act of 1874, § 1, the Landdrost had jurisdiction to try the case. The punishment for seditious libel is not necessarily to exceed six months' imprisonment and a fine of £25. It is said there was a case of a similar kind against one *Ludorff*, tried by the Landdrost at Potchefstroom in 1869. It does not follow that because a possibility exists that a higher sentence than six months' imprisonment may be inflicted, therefore, the Landdrost has no jurisdiction. In Holland there are several placaats or edicts, which prescribe a fine and imprisonment as the punishment for seditious libel. These placaats empower the magistrates of the towns to try and punish cases of seditious libel. Prior to the statute 5 & 6 Vict., c. 38, it was the practice in England for justices to try questions of seditious libel. The verdict of a jury is not always satisfactory or in accordance with the evidence, and the Attorney-General may, in his direction, remit a criminal case to the Landdrost for trial.

Postea (April 30th.)

De Wet, C. J.: This is an appeal from the decision of the Landdrost Court of Pretoria, pronounced in December last, when the applicant was found guilty, sentenced to one month's imprisonment, and condemned to pay a fine of £25, and a further term of imprisonment until the fine be paid, upon an indictment charging him with seditious libel. A preliminary examination was taken in the first instance, and the case was subsequently remitted to the Landdrost Court for adjudication—the Landdrost Court being at present the only Court of inferior jurisdiction in existence in this Province.

Before pleading, appellant's counsel excepted to the indictment upon the ground, *inter alia*, of incompetence of the Court.

a. That the Court of Landdrost is incompetent, accord-

ing to the law of England and of the Transvaal, to adjudge on a case of the nature and extent of that now before the Court.

b. That thereby the rights, which belong to the accused, to be tried by a jury of his countrymen, have been denied him.

Upon referring to the Rules and Practice having reference to the procedure in criminal cases, I find that the first set of Rules promulgated upon the subject were what are called the 33 Articles, which, however, have been to a great extent repealed by art. 220 of the *Grondwet*, and reads as follows:—

All former laws and resolutions contrary to the tenor of these laws are hereby repealed, save and except as is set forth in art. 219.

Art. 219 is as follows:—

All pending cases, still undecided, shall be treated according to the old existing laws of the country, but be adjudicated upon by the newly appointed judges.

Subsequently we have the rules and regulations as laid down in the *Grondwet*, and lastly, the Rules and Regulations as set forth in the Ordinance 5 of 1864, entitled "Ordinance regulating the mode of Procedure in Criminal Cases in the South African Republic," out of which I will quote the following sections:—

Art. 1. All crimes against the laws of this Republic shall be subject to the jurisdiction of the Supreme Court, held in any district of the Republic, whose judgment and sentence shall be final.

2. All crimes against the laws of this Republic and not punishable by death, transportation, or banishment, or liable to heavier punishment as mentioned hereafter, committed within the limits of any district of this Republic, shall be subject to the judgment and sentence of the Courts of Landdrosts, and Landdrosts and Heemraden of the several districts in which such crimes have been committed.

The Courts of Landdrost and Heemraden do no longer exist.

1.
April 11.
" 18.
" 30.

Colliers vs. The Queen.

3. The sentences which the Courts of Landdrost are empowered to pronounce, are:

a. Twenty-five lashes, according to the natnre of the case;

b. Imprisonment, with or without hard labour, for any time not exceeding six months;

c. A fine of Rds. 323 2 4.

Art. 7 provides that the Supreme Court shall have the fullest power of review; in fact, the same power as the Supreme Court of the Colony possesses.

According to Art 163 of the *Grondwet*, the Courts of Landdrosts shall, in the first instance, take cognizance of, pass judgment, and give sentence in criminal cases, to wit: The Court of Landdrosts, in cases of transgressions, breaches of the peace, &c., with respect to which no higher punishment has been prescribed than three months' imprisonment, with or without fine, not exceeding Rds. 300; the Court of Landdrost and Heemraden, in cases of misconduct, when the punishment does not exceed three years' imprisonment, with or without hard labour and fine to the amount of Rds. 500; and the High Court, in cases of offences and other crimes, with respect to which sentences higher than those before mentioned must be pronounced. The sole question embodied in the exception is, whether under the law, as it now stands, the Landdrost had jurisdiction in a case of seditious libel remitted to him by the Attorney-General of this Province. Upon a comparison of Art. 163 of the *Grondwet*, with Art. 3 of Ordinance 5 of 1864, it will be seen that the jurisdiction given to the Landdrost's Courts in 1864, was far in excess of that which such Courts possessed under the provisions of the *Grondwet*. But it has been argued at the Bar, that although the punishments which the Landdrosts are entitled under Art. 3 of 1864 to inflict, are far greater than those mentioned in Art. 163 of the *Grondwet*, yet the jurisdiction of the Landdrost, with reference to crimes and offences generally, remains the same as under the *Grondwet*. In other words, that a person who was found guilty of a transgression or a breach of the peace in 1864, should be punished for the same offence in a greater and more severe manner than he would have been in the year the *Grondwet* was passed. To such reasoning, I, for one, cannot assent. With the increased

measure of punishment, I hold that the Landdrosts' Courts were clothed with increased jurisdiction to try and dispose of crimes other than mere ordinary transgressions or breaches of the peace, &c. That the crime of seditious libel is not punishable by death is, to my mind, clear upon the authority of Van der Linden, the text book for the Transvaal, who, in his Text Book (Dutch edition), lays down that of the crimes against the State, the only one "punishable by death is *hoog verraad*" (high treason) or *crimen perduellionis*. He enumerates the kinds of crimes which can be committed against the State, among which are the following :—"Hoog verraad" (*crimen perduellionis*), "misdaad van gekwetste Majesteit," *(Lœsœ majestatis)* "valsche munt," (*coining*) "openbaar geweld," translated in the English edition, sedition, p. 318. The crime of sedition is the committing of acts of violence and force, by which the public order and tranquillity are endangered, and the authority of the public officers and magistsates is attacked and set at defiance; and again, p. 319 :—"As, however, the crime frequently originates in the different opinions entertained by men respecting the Government of the State, particularly when it has been disturbed by political changes and revolutions, there is scarcely any offence in regard to which it more behoves the Judge to exercise the greatest prudence, to the end that as on the one hand he may preserve and maintain peace and good order, so on the other he may not, through excessive severity, render anyone the unfortunate victim of political dissension." The crime of seditious libel, according to my judgment, is clearly comprehended within what is mentioned in the last paragraph, and the punishment for such crime is undoubtedly a discretionary one. Transportation and banishment are no longer punishments under the laws of the land, but death remains. This is expressly laid down in the *Grondwet*, Art. 149 :—"All sentences in civil, as well as criminal cases, shall be delivered and executed in public in the name of the people of the South African Republic. The criminal punishments to which white offenders in the Republic shall be liable, shall be: Imprisonment, hard labour, with or without chains, according to the circumstances of the case, and death. No white person shall be

1861.
April 11.
" 13.
" 30.

Celliers vs The Queen.

condemned to the punishment of the lash." It may not be out of place to remark here that, in looking carefully through the ordinance of 1864, I find that the Criminal Procedure Acts of the Cape Colony have been followed almost in their entirety. Cases other than those mentioned in Art. 163 of the *Grondwet*, have certainly been adjudicated upon in the Resident Magistrates' Courts of the Colony, under the 47th section of Act 20-56, commonly called the Magistrate's Court Act. By that section it is enacted, "that the Resident Magistrates of the Colony shall, respectively, have jurisdiction without appeal or review, in case of crimes and offences wherein any person may be accused of any crime or offence not punishable by death, transportation, or banishment from the Colony; provided always, that it shall not be lawful for any such Resident Magistrate to punish any offender in any higher or more severe manner than by fine not exceeding the amonnt of £10 sterling, or by imprisonment, with or without hard labour, and with or without spare diet, and with or without solitary confinement, or either of them, for a period not exceeding three months, or by a whipping privately in prison not exceeding 36 lashes." I have not had an opportunity of communicating with the Registrar of the Supreme Court in Capetown, to ascertain how many cases have been adjudicated upon, and the nature of the offences so adjudicated upon; but I have succeeded in laying my hand upon two, both of which cases came in review before the Supreme Court. The one was an offence under the Merchant Shipping Act, and the other a case of indecent assault upon a woman. The first case came on for h aring in the Supreme Court, on September 12th, 1862, when the Acting Attorney-General was heard in support of the conviction by the Resident Magistrate of Simonstown, of William Morgan, boatswain of the *Golden Fleece*, for wilful neglect and insubordination on board that ship, for which the Magistrate sentenced him to six months' imprisonment with hard labour. The Court held that inasmuch as the power of Magistrates in the Colony to punish by imprisonment was restricted to three months, the punishment must be remitted to that period, although the Imperial Acts authorised the infliction of a sentence of six months im-

prisonment for the offence with which the prisoner was charged. The other case is reported in *Supreme Court Cases, Buchanan* 1879, p. 177, *Queen* vs. *Smyth*. I merely mention these cases to show what view has been taken of the interpretation of the 42nd sect. Act 20—56. In addition to what I have already stated, we should not lose sight of the fact that the case before the Court is one that had been remitted by the Attorney-General to the Landdrost Court Let us now see what are the powers of the Attorney-General of this province with refere.ce to criminal prosecutions. According to Ordinance No. 5 of 1864, already quoted, I find the following under the title of Public Prosecutors. As I propose also to quote arts. from Ordinance No. 40 of 1828 (Colonial Ordinance), I deem it my duty to quote from the original Dutch edition, which I have before me.

Art. 10. De Staatsprocureur is belast en de plichten zijn aan hem toevertrouwd, om te prosequeeren in naam en ten behoeve van het Volk der Z. A. Republiek.

Art. 11. Dit regt van Prosecutie wordt door den Staatsprocureur uitgeoefend, waar hij tegenwoordig is zoo *noodig* voor alle de Hoven der Z. A. Republiek, en in zijne afwezigheid door eenig ander persoon door hem daartoe benoemd, onder goedkeuring van Z.H.Ed. den President.

Art. 12. Dit regt en deze magt van prosecutie behoort UITSLUITEND aan den Staatsprocureur, en berust ONBEPAALD onder zijn *eigen beheer en bestier*.

The 6th, 7th, and 8th sections of the Ordinance 40 of 1828, are as follows:—

6. The Attorney-General of the Cape of Good Hope is vested with the right and entrusted with the duty of prosecuting in the name and on behalf of the King, all crimes and offences committed in this Colony.

7. The right of prosecution is exercised by the Attorney-General, in the Supreme Court in person, in the Circuit and District Courts through the medium of the Clerks of the Peace for the respective districts in which such courts shall be held, and in the Police Court in Capetown through the medium of the Superintendent of Police or his deputy, unless any other person shall have been specially appointed by the said Attorney-General to appear and act for him in any particular case before any or either of tho said superior Courts.

8. This right and power of prosecution in the Attorney-General is *absolutely* under his *own management and control.*

Under the powers, as laid down by the laws of this Province, whatever views I may have of the expediency or

1881.
April 11.
" 13.
" 30.

Celliers vs. Queen.

otherwise of sending a case like this to trial by a jury, I am bound to give what I think to be the correct interpretation of the sections I have quoted, and that is, that if, upon any preliminary examination, other than where the punishment of a crime with which a person stands charged is death, a person shall not have confessed his guilt, the Attorney-General of the Province, upon consideration of the preliminary examination, shall be of opinion that the evidence is such as to require that the prisoner shall be put upon his trial, *and be of opinion* also that the exercise of jurisdiction conferred upon him by the provisions of Act 5 of 1864 *will satisfy the ends of justice,* it is then lawful for the Attorney-General to remit the case for trial to the Court of Landdrost by whom the preliminary examination was taken, and that such Court can thereupon proceed to try the same, and, upon sufficient evidence, convict the prisoner, leaving to the person so convicted his right of appeal or review. This has been done, and I am, therefore of opinion that the Landdrost was right in ruling as he did upon the exception. With reference to the exception, therefore, the appeal must be dismissed, and the merits of the case must now be argued on appeal.

Kotzé, J.: The appellant in this matter, Mr. J. F. Celliers, was charged in the Landdrost Court of Pretoria with having committed the crime of printing and publishing a *seditious libel,* upon an indictment presented by the Attorney-General, which set forth "that he, the said Johannes François Celliers, being a wicked, malicious, seditious, and ill-disposed person, and being greatly disaffected to Her said Majesty the Queen, and to Her administration of the Government of this Province, and unlawfully, wickedly, maliciously, and seditiously contriving, devising, and intending to stir up and excite discontent and disaffection amongst her Majesty's subjects, and to excite the said subjects to hatred and contempt of the Government, the laws, and the constitution of this Province or Colony as by law established, and to alienate and withdraw the affection, fidelity, and allegiance of Her said Majesty's subjects from Her said Majesty, and unlawfully and wickedly to seduce and encourage Her Majesty's sub-

jects in the said Province to resist and oppose Her Majesty's Government and the execution of the laws of this Province, and cause it to be believed that her Majesty's subjects in the Transvaal Colony or Province, belonging to the Crown of Great Britain, are being robbed, and that the taxes which are levied are unlawfully demanded and illegally imposed, and that her Majesty's Government in this Province is not the lawfully constituted Government of this Province, and that those who are officials entrusted with the administration of the Government of this Province and the execution of its laws are low betrayers of the country, did upon or about the 16th day of November, &c., print and publish." Here follow nine counts charging Mr. Celliers with having on different occasions printed and published seditious matter with the view and intent as above stated. In the Court below the exception was taken that the Landdrost had not by law jurisdiction to try the case. The exception was overruled, and, after evidence taken, Mr. Celliers was convicted by the Landdrost, and sentenced to a month's imprisonment and to pay a fine of £25. Upon the merits of the case, I desire at this stage to say nothing, the only question for consideration being the point, whether by the law of this country a Court of Landdrost has jurisdiction to try a case of *seditious libel*, as laid in the indictment against Mr. Celliers? There are several provisions of our statute law defining the jurisdiction of the Court of Landdrost. By Art. 143 of the *Grondwet* it is provided that in each district there shall be (1) a Court of Landdrost, (2) a Court of Landdrost and Heemraden, and (3) a Supreme Court for the whole country, consisting of three Landdrosts and 12 jurymen. An appeal lay from the first and second tribunal to the Supreme Court, which was, however, a Court of first instance in cases of murder, treason, and the like. Art. 163 of the *Grondwet* provides as follows: "The Courts mentioned in art. 143 shall take cognizance in the first instance, decide, and pass sentence in all criminal cases, to wit: The Court of Landdrost, in cases of wrong-doing, breaches of the peace, &c., wherein no higher punishments are allowed than three months' imprisonment, with or without fine up to Rds. 100 (£7 10s.) The Court of Landdrost and Heemraden, in cases of misconduct, wherein the punishments do not exceed

1881.
April 11.
" 18.
" 30.

Colliers vs. The Queen.

three years' imprisonment, with or without hard labour, and with, or without, fine up to Rds. 500 (£37 10s.) And the Supreme Court, in cases of crimes and other wrongs, wherein heavier punishments than those above stated must be pronounced." We have next the *Criminal Procedure Law* of 186 , which, by its first section, enacts : "All crimes committed against the laws of this Republic shall be subject to the jurisdiction of the Supreme Court, to be held in any district of the Republic, whose decision and sentence shall be final. Art. 2 : All crimes against the laws of this Republic, and not punishable with death, banishment, or transportation, or subject to heavier punishments as hereinafter provided, committed within the limits of any district of the Republic, shall be subject to the jurisdiction and decision of the Courts of Landdrost, and Landdrost and Heemraden, of the different districts in which such crimes are committed. Art. 3 : The punishments to be pronounced by the Court of Landdrost shall be as follows :—*a.* whipping up to 25 lashes, according to the nature of the case; *b.* imprisonment with or without hard labour, not exceeding six months; *c.* fine up to £25. Art. 4 : The Court of Landdrost and Heemraden shall have the power to pronounce the following sentences :—*a.* whipping up to 50 lashes, according to the nature of the case; *b.* imprisonment with, or without, hard labour, not exceeding three years; *c.* fine up to £50. Art. 5 : The sentences to be pronounced by the Supreme Court shall be—*a.* death; *b.* imprisonment for life with, or without, hard labour, or for any shorter period; *c.* transportation or banishment for any period according to the nature of the case; *d.* whipping not exceeding 100 lashes, with or without imprisonment and hard labour." Lastly, we have the new *Criminal Procedure Act* of 1874, which, by its first section, enacts; "The Courts of Landdrosts, and Landdrost and Heemraden, have jurisdiction in criminal cases according to the provisions of the *Grondwet*, and the *Ordinance Regulating Criminal Procedure.*" I have deemed it necessary to state fully the local Law on the subject. The question for decision, which is of great importance, rests entirely upon the construction of the enactments above set forth. The point has been solemnly raised for the first time whether, regard being had to these provisions of the

local Law, the Court of Landdrost has jurisdiction to try a case of seditious libel, as laid in the indictment against Mr. Celliers, and as my learned brother differs in opinion from me, I express my views with great diffidence. It seems to me that under art. 163 of the *Grondwet*, the Landdrost had no jurisdiction to try the case. The *Grondwet* simply contemplates the punishment of petty and minor offences when speaking of the jurisdiction of the Landdrost. This much is clear. But a difficulty arises when we refer to art. 2 of the *Criminal Procedure Law* of 1864. By this, and the following article, the jurisdiction of both the Landdrost Court and the Court of Landdrost and Heemraden, so far as the amount of punishment is concerned, is clearly increased, and it is argued for the Crown that, under this particular section 2, the Court of Landdrost, as well as the Court of Landdrost and Heemraden, has jurisdiction to try *any* offence not punishable with death, transportation, or banishment. I feel myself unable to concur in this view. No doubt the wording of the section in question is very similar to the provisions of Ordinance 40 of the Cape Colony, and if we had merely the section itself to deal with, we might interpret it in the way in which it would, perhaps, be interpreted in the Cape Colony, although it must be observed that we have here in this section words placed together which appear twice over in two separate sections in the Cape Ordinance; so that whereas no ambiguity exists in that Ordinance, there being separate sections distinctly stating the jurisdiction of each separate Court in the Colony, here we have but one section dealing with the question of the jurisdiction of the two Courts of Landdrost and of Landdrost and Heemraden. The section under consideration, if the argument for the Crown be correct, would give a Landdrost jurisdiction to try cases of culpable homicide, rape, and in fact almost every crime short of murder. It would then simply depend upon the discretion of the Attorney-General whether he will remit such cases to the Court of Landdrost, or bring them before a higher tribunal. Such an interpretation of the section would amount to a virtual repeal of art. 163 of the *Grondwet*, for it would entirely alter the character and nature of the offences which the Landdrost is by the

Grondwet empowered to try. But then what becomes of the first section of the new *Criminal Procedure* of 1874, which speaks of the criminal jurisdiction of the Landdrost under the provisions of the *Grondwet* and the *Criminal Procedure Act* of 1864? These very words should remind us of a simple rule of construction, viz., that the enactments of the local law must be read together, and such an interpretation given to them as will make them consistent the one with the other. If § 2 of the Law of 1864 had (like in the Cape Ordinance) merely mentioned the Court of Landdrost alone, I will readily admit that nothing could be clearer than that that tribunal would have jurisdiction to try almost all cases except murder; but it speaks of the Court of Landdrost *and* of Landdrost and Heemraden, and reading this and the following section, together with the provisions of the *Grondwet*, it appears to me clear that so far as the Courts of Landdrost and of Landdrost and Heemraden are concerned, the *Grondwet* fixed more or less distinctly the *nature* of the cases to be tried before each of these tribunals as well as the punishments to be inflicted; whereas the Law of 1864, leaving the nature or character of the offences to be tried by each Court untouched, simply increased the sentences that could be pronounced. What was there to prevent the Court of Landdrost and Heemraden trying a case of rape or culpable homicide, or any other crime, for which the punishment is no longer death, transportation, or banishment, under the *Grondwet?* Surely nothing, but clearly the Court of Landdrost merely had no jurisdiction to try such cases under the *Grondwet*. The *Criminal Procedure Act* of 1864, therefore, so far as the *nature* of the offence is concerned, confers no new jurisdiction on the Court of Landdrost and Heemraden, but simply increases the punishment; why then must it necessarily do so with respect to the Court of Landdrost? All offences (says article 2), the punishment for which is not death, banishment, or transportation, can be tried by the Landdrost, and Landdrost and Heemraden Courts; of offences so triable, some only can be tried by the Landdrost Court; and, therefore, when the Legislature says in one sentence that all offences not punishable by death, &c., can be tried by the Landdrost, and Landdrost and Heemraden Courts, it by no

means follows that it meant to predicate that where the latter tribunal has jurisdiction, the former must necessarily have jurisdiction also, although the converse of this position would be quite correct. Let us assume, for the sake of argument, that no distinct provision in our local law existed relative to cases of murder, but that the legislature had provided "that all offences against the laws of the Republic shall be tried by the Courts of Landdrost, the Courts of Landdrost and Heemraden, and the Supreme Court." Will it for a moment be contended that the Landdrost could, under this provision, try *any* case, even one of murder? Clearly not. All that would be intended by the Legislature would simply be that crimes could be tried by any one of these tribunals, each in its jurisdiction and no more. Applying the same process of reasoning to the interpretation of §§ 2 and 3 of the *Criminal Procedure Act* of 1864, I am of opinion that thereby only the amount of punishment is increased, but not also that the character or nature of the offences which the Landdrost could try under the *Grondwet* has been changed or affected. But then it may be asked, why was the jurisdiction as to punishment increased if it was not intended that it should also be increased with respect to the character of the offence? I answer, the one does not as a matter of course follow from the other. The only increase in jurisdiction of the Landdrost, as to the amount of punishment he could give, is imprisonment for six months instead of three, together with hard labour, and the enlargement of the fine from £7 10s. to £25. The same criminal might have been convicted of a similar offence before by the Landdrost, and to enable the Landdrost to deal more severely with such a prisoner his jurisdiction may have been increased with that view. No preamble is to be found to the *Criminal Procedure Act* of 1864, nor are any reasons given from which we can say with certainty what was the precise intention of the Legislature in enacting § 2 of the Act. I think we must be careful not to identify too much the jurisdiction of our Court of Landdrost with that of a Resident Magistrate in the Cape Colony. Reading the provisions of the local law *in pari materia* together, I am of opinion that the Landdrost has only power to try cases of the nature of

1881.
April 11.
" 18.
" 30.

Colliers vs. The Queen.

petty or minor offences, as provided in the *Grondwet*, and not that he can try *any* case, the punishment for which is not death or transportation. It would, I think, startle the profession if we held that rape, culpable homicide, assault with intent to commit murder, &c., could, under the local law, be remitted to a Landdrost for trial, for I believe I am correct in stating that such has not been the local practice. Much has been said about the Attorney-General's discretion in criminal matters. His powers are, no doubt, very great and important, but they cannot give an incompetent Court jurisdiction. Several placaats were referred to in support of the argument that the Landdrost had jurisdiction, for it was contended that by these placaats the Magistrates in Holland are directed to proceed promptly and summarily against the printers and publishers of seditious books and libels, and authorised to pass sentence of fine and imprisonment. I have carefully perused all the placaats on the subject, but fail to see that because the Scheepenen or Magistrates in the towns of Holland had jurisdiction to try offenders against the provisions of these statutes, that therefore our Courts of Landdrost have jurisdiction also in similar matters. The placaats have obviously no application to the present case, for if they are still in force here in the Transvaal, then must, for instance, the placaats against vagrancy, pulling of door-bells, and the importation of spices, also obtain as law amongst us at the present day. It has been very ingeniously argued that the punishment for seditious libel is not necessarily to be above six months' imprisonment and a fine of £25, and that accordingly the Landdrost has jurisdiction. This is simply *petitio principii*, a begging of the question. The infliction of a sentence within his jurisdiction, does not yet give the Landdrost jurisdiction in the subject matter. We must look to the kind and character of the offence charged, as well as the punishment inflicted. A charge of publishing a series of seditious libels, with the view of alienating Her Majesty's subjects from their allegiance, and seducing and encouraging them to resist and oppose the Government and the execution of the laws, is not such a minor offence as is contemplated by the provisions of the *Grondwet*. But apart from these considerations, there exists another reason

against the exercise of jurisdiction by the Landdrost in this case. Article 9 of the 33 Articles subjects all those who are guilty of treasonable conduct against the State ("alle personen die pogingen aanwenden om *verraad* te plegen"), to a fine of Rds. 500, and banishment or transportation. In such a case, it is clear that the Court of Landdrost has no jurisdiction. Now, does the offence with which Mr. Celliers was charged amount to *treasonable conduct* against the State within the meaning of this section? The 33 Articles, which were promulgated before the *Grondwet*, from a series of enactments or rough code, intended to provide for the immediate wants of the young community known as the S. A. Republic. The pioneers from the Old Colony, who founded this State, were very jealous of anything said or done against the authority of their Government, or with the view of endangering its stability and existence, hence the provision in Article 9, subjecting those who communicate with foreign Governors for such a purpose, or are guilty of treasonable conduct, to the penalties therein specified. I think the offence of which Mr. Celliers was convicted by the Landdrost, comes within the meaning of this 9th Article. The crime of seditious libel, as set forth in the indictment against him, is a species of *crimen læsæ majestatis*. But there is this distinction: simply libelling the head of the Government, or the officers of the Government, is *crimen læsæ venerationis*, and may be punished as such or as *injurie;* whereas printing a series of seditious libels *hostili animo, i.e.*, with the view of undermining the authority of Government, or inducing the subjects to resist its authority and shake off their allegiance, as laid in the indictment, is a species of *perduellion* or *verraad*. These terms include both treason and sedition, as defined in English law (*Cf. Voet*, 48, 4, 2, and 3, and Decker's edition of *Van Leuwen*, bk. 4, ch. 31, note 1). For these reasons, I think the conviction ought to be quashed and the fine remitted.

MEINTJES *vs.* MEINTJES.

Provisional Sentence.—Martial Law.—Noting Expenses.

The defendant to a claim for provisional sentence on a promissory note objected to pay the noting expenses, on the ground that the existence of Martial Law rendered presentation and noting unnecessary; Held, that the objection was untenable.

1881. April 19. — Meintjes vs. Meintjes.

Morcom (Attorney-General), prayed provisional sentence on a promissory note made by defendant and due on 18th March, 1880.

Hollard contra: The defendant admits the debt, but objects to pay the noting expenses. The note sued on was noted during the existence of Martial Law, which was proclaimed on 21st December, 1880, and the proclamation was not withdrawn until 31st March, 1881. The defendant was a volunteer on active service during that period, the Courts of Law were closed, and as there was no necessity to note the promissory note, the expenses of such noting cannot be demanded of the defendant. *Story on Notes*, § 356. The defendant was prevented by his military duties from paying the note, nor was he bound to pay at the time. *Story*, § 261; *Story on Bills*, § 327.

Morcom (Attorney-General) in reply. The cases in 1 *Menz.* show there must be presentation and noting, even against the drawer of a bill or maker of a note. *Marillac* vs. *Scheepers*, *Buch.* 1870, p. 31; *Van der Byl* vs. *Du Plessis*, *Buch.* 1868, p. 2. Notwithstanding the investment of Pretoria it was possible to note the bill. *A.* vs. *B.*, 3 *Menz.*, 446; *Barry* vs. *Van Rensburg*, ib.; *Chitty on Bills*, 252, 226 (11th edn.)

The COURT held that the defendant had not shown any just grounds for refusing to pay the noting expenses; and gave provisional judgment against him as prayed.

ZEILER & Co. *vs.* SHEPPARD.

Rule VII.—Declaration following Arrest.

Rule VII. prescribes that where a defendant has been arrested a declaration shall be served upon him within 48 hours after execution of the arrest. Where, therefore, a declaration was served on defendant's attorneys within 48 hours after the Sheriff had made his return to the writ of arrest, although the defendant had been arrested seven days previously; Held that the words "48 hours after execution of arrest" mean 48 hours after execution of the process of arrest, and that the declaration had been served in time.

1881.
April 19.

Zeiler & Co. vs. Sheppard.

The defendant Sheppard had been arrested and held to bail. The plaintiffs filed a declaration under Rule 7 of the Rules of Court. The defendant, before pleading, excepted that the declaration was not served on the defendant within the 48 hours prescribed by Rule VII.

Rule VII. provides:—"In cases of arrest, a declaration shall follow the writ of arrest; which declaration shall be filed of record and served on the defendant within 48 hours after execution of the arrest."

The defendant was arrested by the Deputy Sheriff of Potchefstroom on 12th October. The Sheriff at Pretoria received the return by post from his Deputy late on the afternoon of 16th October, after the offices were closed. The next day being Sunday, the Sheriff informed the attorneys of the plantiff of the arrest on Monday morning, 17th October, and handed the writ of arrest, together with his return thereon, to the Registrar on the same day. On the 19th October, within 48 hours after they had received notice of the arrest from the Sheriff, the attorneys of the plaintiffs filed and served the declaration on the attorney of the defendant.

Cooper, in support of the exception, argued that execution of the arrest was completed the moment the defendant had been actually arrested under the writ. The Sheriff's

1881. April 19. — Zeiler & Co. vs. Sheppard.

return is not part of the execution of arrest. *Blore* vs. *Dryer*, 1 *Menz.*, 128, shews that Sunday is not excluded in calculating the *Inducicæ*.

Hollard, with him *Cloete, contra.*

DE WET, C. J.: We think the words "48 hours after execution of arrest," occurring in Rule VII., mean 48 hours after execution of the process of arrest It, therefore, includes the official return of the Sheriff to the Registrar, and accordingly the declaration was served within 48 hours in terms of the Rule.

DON *vs.* ERASMUS.

Commission de Be e Esse.

The general rule is that a Commission de be e esse, *to examine witnesses, will not be granted before pleadings have been closed.*

1881. April 26. „ 30. — Don vs. Erasmus.

Cooper moved for a Commission *de bene esse*, to examine witnesses in Griqualand West and Scotland in the case of *Don* vs. *Erasmus*.

Cloete opposed. The plaintiff is a *peregrinus*, and has given no security for costs.

DE WET, C. J.: Until security for costs is given the application can not be heard.

Postea (April 30th.)

Cooper renewed the application.

Cloete, contra. No pleas have yet been filed.

DE WET, C. J.; No special circumstances have been set forth, which will justify a departure from the general rule,

that until pleadings have been closed a Commission *de bene esse* will not be granted. The application must be refused with costs.

1861. April 26. " 30. Don vs. Erasmus.

ZEILER *vs.* HOLLINS & HOLDER.

Attorney.—Bill of Costs.—Provisional Sentence.

Provisional sentence on a taxed Bill of Costs in favour of an attorney refused, where the defendant objected that the attorney had no power to appear and act for him.

Cooper prayed for provisional sentence on a taxed Bill of Costs, in favour of attorney Zeiler, against Hollins & Holder, who were defendants in the case of *Jacobs* vs *Hollins & Holder.*

Cloete opposed, and read an affidavit of R. R. Hollins setting forth that in *Jacobs* vs. *Hollins & Holder* Van Eck had been engaged as attorney for the defendants, and repudiating Zeiler's power and authority to act as attorney for the defendants in that case. *Dickson* vs. *Gildenhuys*, 1 *Menz.*, 60.

DE WET, C. J.: Provisional sentence must be refused.

HERSCHENSOHN *vs.* COHEN.

Slander.—Words spoken in Rixa.—*Retort.*

The defendant, having had a quarrel with the plaintiff, said to him in the hearing of witnesses, "You are a thief and a swindler." These words were addressed to the plaintiff after he had called the defendant a "d——d little sweep," &c.; Held, that the words "thief" and "swindler" were used in rixa *and* ab irae impetu, *and had been compensated by what the plaintiff had said of the defendant.*

1 May 9.

Herchenhohn vs Cohen.

Action for £1,000, as and for damages by reason that the defendant had spoken and said of the plaintiff, in presence of several persons, "you are a thief and swindler." From the evidence it appeared that the defendant had used the words complained of after he had been called by the plaintiff a "d——d little sweep," and told by him "to go to hell."

Cooper, for the plaintiff.

Hollard, for the defendant, cited *Powel* vs *Price*, 1 *Menz.*, 500.

The COURT held that the defendant had used the words thief and swindler *in rixa* and *ab irae impetu*, and that these words had been compensated by what the plaintiff himself had said of the defendant.

Judgment accordingly for the defendant, with costs.

LONGLANDS *vs.* FRANCKEN.

Landlord's Hypothec for rent on omnia illata et invecta.

The goods of a third party, found in a house occupied by the lessee, are subject to the lessor's hypothec for rent, provided the goods were brought into the house with the consent of their owner, and for the purpose of permanently remaining therein for the use of the lessee.

1881. May 25. " 27.

Longlands vs. Francken.

Application by Ada Longlands and Gertrude E. Longlands, praying the Court to set aside an attachment of furniture, the property of the applicants, under the following circumstances:—Judgment had been given by the Landdrost of Pretoria, at suit of Francken, against the father of the applicants, for arrear rent. A writ of execution was taken out, and certain goods and chattels were seized under it. Among the goods attached by Francken (the lessor and judgment creditor) were a piano and a few other articles of furniture, admitted to be the property of the applicants. The first applicant was of age, and the second applicant, although only 20 years old, had virtually

been emancipated from parental control. Both young ladies were, at the time of execution, temporarily residing with their father. They had for the last few years supported themselves, partly out of funds settled upon them in trust by their grandmother, and partly with their own earnings as teachers and governesses. The piano, and other articles, claimed by them had been purchased with their own money.

Cooper, in support of the application.

Cloete, for the respondent: The landlord has a tacit hypothec on everything found in the house, whether brought therein by the tenant or a third party. *Van Leeuwen, Rom. Dutch Law.* bk. 4, ch. 13, § 12; 3 *Burge*, 590, 594-5; *Regts. Observ.* vol. 1, observ. 72; *Grotius*, 2, 48, 17, and *Schorer in notis; Van der Keessel, Th*, 423, *Th.* 453; *In re Stillwell*, 1 *Menz.* 537.

Cooper, in reply: The applicants use the piano and other articles exclusively for themselves. *Grotius* (Maasdorp's edn.), p. 283; *Huber, Heed. Regts.*, bk. 3, ch. 10, s. 11; bk. 5, ch. 40, § 3; *Erskine's Institutes*, vol. 1, title 6, page 181.

Cur. adv. vult.

Postea (May 27th).

KOTZÉ, J. (delivering the judgment of the Court): We think that, for the purpose of this application, the relation of parent and child ought not to affect our decision. Regarding the applicants as mere strangers, I will proceed to consider the argument, advanced on behalf of the respondent, as to the lessor's hypothec on *omnia illata en invecta*. We incline to the principle of law that the goods of a third person found in a house occupied by a lessee are subject to the lessor's hypothec for rent (where the property of the lessee proves insufficient), provided the goods were brought there with the consent of their owner, *and* for the purpose of permanently remaining therein for the use of the lessee. *(Consult. and Advys.*, vol. 2, cons. 52 and 53.) This opinion, laid down by the *Dutch Jurisconsult*, is approved and

1881.
May 25
" 27.

Longlands vs. Francken.

adopted by Kersteman *(Regts. W. Boek, in voce Huur.*, p. 185), and by Voet (20, 2, 5), who, however, seems to lay down the rule in the alternative, viz., that the goods of the third party will be subject to the landlord's hypothec if brought into the house permanently, *or (sue)* for the use of the lessee. But as property, brought into a house for a temporary purpose for the use of the lessee, will not be subject to the landlord's hypothec, we must read *and* instead of *or* in the text of *Voet*, especially as he cites the *Dutch Jurisconsult* with approval. The only reported case, which I have been able to find, in the Supreme Court of the Cape Colony, bearing on this point, is *Crowley* vs. *Domony (Buch. Rep.*, 1869, p. 205). There the landlord's tacit hypothec was held to prevail over the separate property of a wife married by ante-nuptial contract. The wife brought her own furniture into a house rented by her, for, and on behalf of, her husband, without mentioning to the lessor that she was married under ante-nuptial contract. The Court, under the circumstances, refused to set aside an attachment of her furniture in consequence of a judgment obtained against her husband for rent. The reason for the decision of the Court is not given; but the case seems to fall within the rule above stated, for the furniture was brought into the house with the view of continuing therein for the joint use of both husband and wife. In the present instance there is nothing to shew that the furniture of the applicants was brought into the house rented by their father to remain there indefinitely for his use and benefit. The applicants are, apparently, only temporarily residing with their father, and use the articles claimed by them exclusively for themselves. Several authorities have been cited in support of the attachment, but none of them, when carefully considered, state anything necessarily conflicting with the view we are disposed to adopt. *Grotius* (2, 48, 17) simply lays down that the landlord's hypothec extends over all moveables brought into the house *by the hirer*. This general statement has been somewhat qualified by *Groenewegen ad Grot*, who explains that it refers to moveables being the property of the hirer, or of a third person, and brought into the house with the third person's consent, and with the object of always remaining therein.

1881. May 25. " 27.

Longlands vs Francken.

The explanation of Groenewegen is approved by Schorer. Next we have a passage cited from *Van Leeuwen's Commentaries* (4, 13, 12), where it is said that the lessor's hypothec extends to everything brought and kept in the house. In the *Censura Forensis* (4, 9, 3), however, Van Leeuwen carefully qualifies this general assertion, and lays down the rule as given by Groenewegen. *Van der Keessel (Th.* 432) merely speaks in a general way of the lessor's tacit hypothec in case of a lease of *land*, and *Van der Linden* (1, 12, 3) simply repeats the language of Grotius. Burge, in treating of the law of Holland, as to the landlord's hypothec, has but compiled the views expressed by the above writers. The law, as stated by Groenewegen, is no doubt correct as far as it goes, but he has only given us a branch of the rule. We think the true rule is that given by Voet on the authority of the *Dutch Jurisconsult*, and that consequently moveables, the property of a third party, brought into a house for a temporary purpose merely, or not for the benefit and use of the lessee, are not subject to the lessor's hypothec for rent, where the lessee's property proves insufficient to satisfy the same. The attachment must, accordingly, be set aside; but as this is virtually a test case, there will be no order as to costs.

Ex parte VAN MANEN.

Curator ad litem *appointed to Minor beyond jurisdiction.— Interdict.*

1881. June 28.

Ex parte Van Manen.

Cloete moved for the appointment of a *curator ad litem* to the minor, W. E. Pistorius, residing out of the jurisdiction of the Court, who had seduced the applicant's daughter, also a minor and recently delivered of a child. He also applied for an interdict on the inheritance of Pistorius in the hands of the Orphan Master, pending an action to be brought by the applicant, as guardian of his minor daughter, for damages by reason of the said seduction, &c. *Letterstedt* vs. *Executors of Letterstedt, Buch. Rep.*, 1874, p. 42.